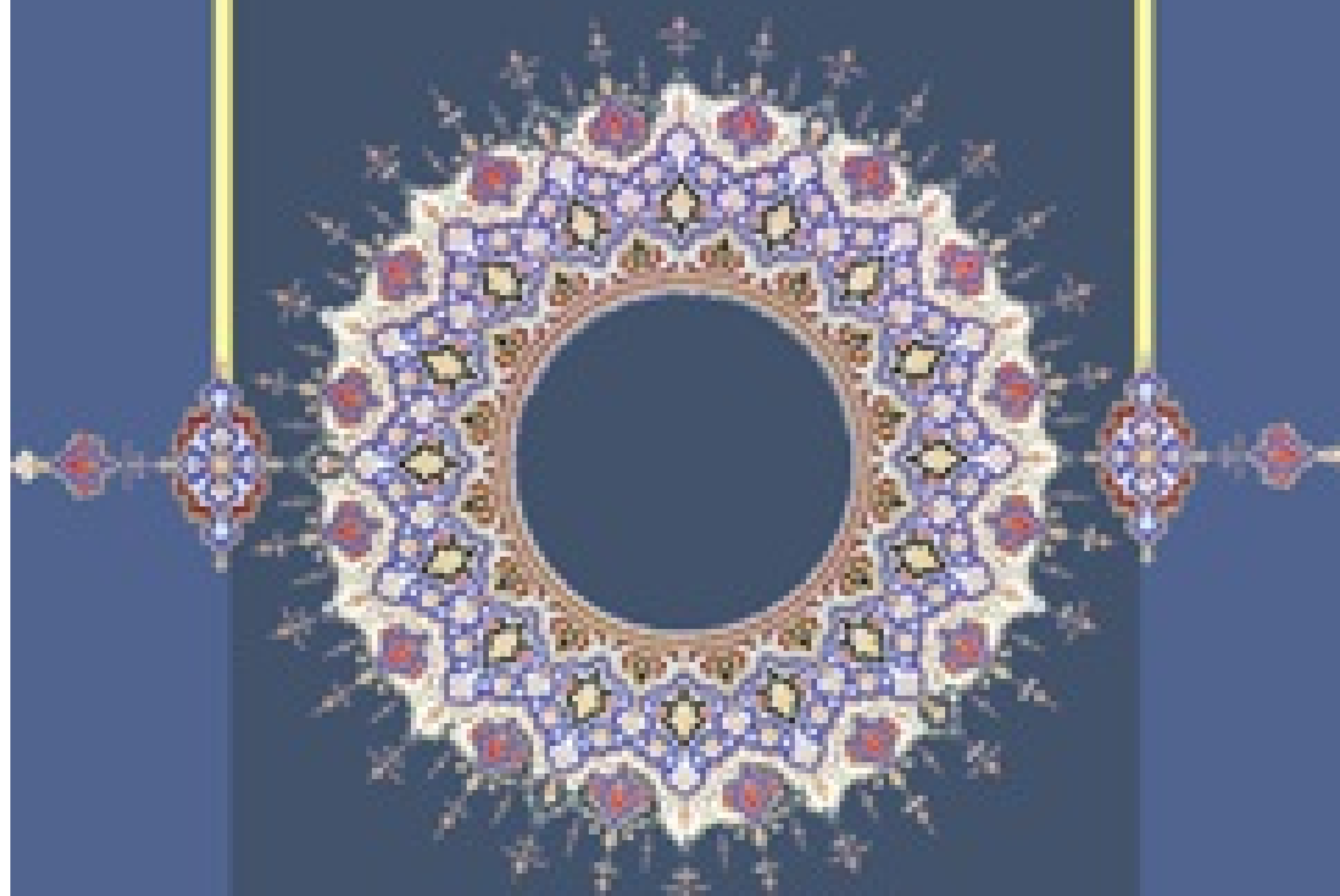
Child Custody in the Islamic Jurisprudence



Author: Saeid Nazari Tavakkoli

Translator: Ahmad Rezwani

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point

In this informative book written and compiled by Saeid Nazari Tavakkoli, we learn the many different laws on the rights of the mother, the father, the child, and their related topics such as breastfeeding, weaning, child custody in case of divorce, responsibilities of the parents, rules regarding abandoned children, and a great many other laws related to these very important topics according to Islamic Shia jurisprudence. Laws discussed in this book are based on the Quran, and Hadith of the Prophet (saws) and holy Ahlu-Bayt (as). Various fundamental opinions of other Islamic .schools of thought are also mentioned herein and discussed

Publisher's Note

The holy religion of Islam, which was presented to mankind by God through the last of the divine Prophets, Hadhrat Muhammad (S.A.W.), is a collection of tenets, ethics, and rulings. Encompassing the Muslims' practical duties, divine rulings are so comprehensive that they cover all individual and social aspects of their life. As being devised by the Exalted Allah, who is fully aware of all the things useful and harmful to mankind, these rulings are so

consolidated that despite centuries passed they are still capable of responding to the .human needs

Among these divine rulings are those concerning children. As the most principal source of rulings for the Muslims, the Holy Qur'an has in various verses dealt with the children's issues and spoken about their rights as well as the parents' duties towards them, in detail. Furthermore, religious leaders, i.e., the Holy Prophet of Islam (S.A.W.), and the Infallible Imams (A.S.) have more extensively addressed these issues and .examined them from various perspectives

What is inferred from the collection of religious teachings is the justice-oriented approach of Islam towards the child's rights from the infancy up to the age of maturity. Accordingly, on one hand, the mother is obliged to breastfeed her child at least for ٢١ months; and the father, on the other hand is committed to provide for the

material needs of the mother and the child in this period in the best way possible. This approach continues after the suckling period, too; the parents cooperate with one another to take care of their child and provide for their various needs so long as they .grow old enough to be able to stand on their own

Justice-orientedness and attending to the child's rights is carried on even through the period when parents are separated. Islam, on one hand, officially recognizes the mother's right to take care of her child and, on the other, emphasizes the father's right to his guardianship over his child. However, the child's right

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.to enjoy the paternal and maternal affection and kindness is not ignored as well

Child Custody in the Islamic Jurisprudence, written originally in Persian by the distinguished researcher Saeid Nazari Tavakkoli and published by The Islamic Research Foundation of Astan Quds Razavi in cooperation with The Center for Studying and Compiling University Books in Humanities (SAMT) in ٢٠٠۶, is considered as the first independent book concerning children's rights and custody, an issue discussed with a Qur'anic approach on the basis of jurisprudential, exegetical, and .hadith fundamentals of various Islamic sects

Holding a PhD in philosophy and besides being familiar with Islamic jurisprudence, philosophy, and mysticism, the writer has for years been dealing with jurisprudential issues and is at present among those making research on bioethics and medical .jurisprudence

The author's works published by The Islamic Research Foundation of Astan Quds :Razavi are

١ . Al-Tarqi' wa Zar' al-A'dha' fi Fiqh al-Islami (Arabic) [Organ Transplantation in (Islamic Jurisprudence] (١٣٨٠/٢٠٠١

٢ . Payvand A'dha' dar Fiqh-i Islami (Persian) [Organ Transplantation in Islamic (Jurisprudence] (١٣٨١/٢٠٠٢

Hidhanat-i Kudakan dar Fiqh-i Islami (Persian) [Child Custody in Islamic . ۳ (Jurisprudence] (۱۳۸۶/۲۰۰۷

Hadithi Wilayat, Nigarishi Naw dar Ma‘na Shinasi (Persian) [Hadith of Guardianship, .۴ (a New Approach to Semantics] (۱۳۸۷/۲۰۰۸

Guzargah-ha dar Fiqh-i Islami (Persian) [Passageways in Islamic Jurisprudence] .۵ ((۱۳۸۸/۲۰۰۹

Hayvanat, Qavanin Himayati wa Hudud- Bahravari dar Islam (Persian) [Animals; .۶ Protective Rules and Exploitation Limits in Islam] (Islamic Research Foundation SAMT (Publication – ۱۳۸۸/۲۰۰۹

Nazariyya Padayish-i Jahan dar Hikmat-i Yamani wa Hikmat-i Muti‘aliya (Persian) .۷ [Origins of the Universe

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(in Transcendent Philosophy and the Yamani Wisdom] (۱۳۸۹/۲۰۱۰

The IRF hopes that the English publication of Child Custody in the Islamic Jurisprudence is an effective step towards introducing the high capacity of Islamic .jurisprudence in solving children's problems

Islamic Research Foundation of Astan Quds Razavi

Prologue

point

Among the social units, family is the smallest and at the same time, the most important unit that comes into being through creating a marriage bond between a .man and a woman

Although marriage has various functions, from among them reproduction, which is .motivated by perpetuation of generations, enjoys a distinguished place

In order for such a function to be realized, three essential components, i.e. father, mother, and child, are required to form an entity. The type of relationship they have, the way they interact, and their reciprocal duties have been open to discussion in legal .systems of both civilized and uncivilized societies and are still seriously pursued

Islamic legal system, like other legal systems, has not been exempted from this issue. Given its integrity and thoroughness, the true religion of Islam has studied this issue .from different perspectives

Apart from many verses (ayas) focusing on matrimonial issues (marriage) and separation of couples from each other (divorce), the Holy Qur'an has discussed such issues as pregnancy, breastfeeding, and their related problems in four different .verses

In hadith collections, too, there are many traditions related to us from the Ahl al-Bayt .(A.S.) dealing with the children's rights

Similarly, great Shiʻa jurisprudents have on various occasions addressed the issues concerning mothers and

children; however, they have started up an independent chapter to this end. Researchers may study the legal views on breastfeeding and custody of children :within the following sources

Kitab al-Nikah, the issues concerning two discourses of suckling (ridhaʻ) and . ۱ ,(guardians of marriage contract (awliya' al-ʻaqd

,(Kitab al-Talaq, concerning pregnant woman's waiting period (ʻidda) after divorce .۲

,(Kitab al-Luqata, concerning human foundling (luqata .۳

Kitab al-Hudud, concerning implementation of legal punishment (hadd) upon . ۴ pregnant and suckling women as well as implementation of legal punishment for ,apostacy upon an underage person

۵. Kitab al-Makasib, concerning [receiving] wages for obligatory tasks,

۶. Kitab al-ʿItq and Kitab al-Bayʿ, concerning separation of a child from its mother,

۷. Kitab al-Taharat, concerning dependency (tabaʿiyya).

In any case, for further information of the respected reader on the details of the research performed concerning the problems of children's rights in Islamic jurisprudence, the following explanations need to be made.

Research Methodology

point

Since I wished to make perfect and comprehensive information available to the reader, I spent a whole year with much perseverance undertaking the following steps respectively:

Studying Legal Texts

To this end, I consulted most of the Shiʿi legal texts extant from ۱st/۷th century up to the present, in which the issues about children were implicitly or independently discussed and their subjects have been topically catalogued and classified.

Since the core of discussion in the present book is the status of children's rights in Islamic jurisprudence with a focus on the Shiʿa school, the detailed study of the legal opinions of other Islamic schools was

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ruled out; however, in order to avoid ruining the inclusiveness of the research, the views of the Sunni jurists have been briefly and selectively extracted from the main legal texts of each of the Sunni schools and occasionally from the texts of the latter periods and put to discussion within the related discourses.

Studying the Exegetic Texts

Of all the verses of the Qur'an, in only four verses such topics as pregnancy, (breastfeeding and the related issues have been brought up and talked about.(١

In order to attain a correct understanding of the meaning of these verses and thereby obtain appropriate legal rulings from them, it is essential to become acquainted with the viewpoints of the interpreters and whatever presented in their exegetical texts concerning them. Therefore, I devlved into almost all the Shi'i exegetical texts regardless of the language – either Persian or Arabic – and the major Sunni exegetical .sources irrespective of their religious approach

It goes without saying that the probabilities existing in exegetical books are too diverse and numerous to be trusted, particularly when most of them – without having any historical or narrative foundation – are the products of their devisers' thinking. Thus, it was not deemed sufficient to merely quote the probabilities set forth; rather, it was undertaken to critically review and assess them as well, and only one out of all the existing probabilities was selected according to the reasons and evidences .explained in the book

Study of the Narrative Texts

In order to legally evaluate an issue, the most essential thing to do is to

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١ - The Qur'an, with an English Paraphrase, tr. Sayyid 'Ali Quli Qara'i, the Center for .Translation of the Holy Qur'an, Qum, ۲۰۰۳ (= Q.), ۲: ۲۳۳; ۳۱:۱۴; ۴۶: ۱۵; ۶۵: ۶

find the traditions proportionate to that issue and to examine the authenticity of their .chain of transmission and their meaning

Consequently, all the traditions narrated from the infallible and virtuous Ahl al-Bayt (A.S.) concerning the issues discussed in this book were compiled as per their relation .to the subject and made use of with regard to their authenticity and validity

Compilation Methodology

point

In order to the compile material for this book the following procedures have been :respectively employed

Stating the Jurist's Opinions

At first, the issues were brought up according to the views presented in legal sources and the explanations given by earlier jurists, with the references being footnoted in .terms of their importance

Selecting

Once the issue was brought up, if I accepted what the great jurists had previously stated, the matter was stated with reference to legal books, without referring to my .own view

However, in case I did not agree with a matter, I stated my opinion independently; although I have tried to mention it in the footnote if I happened to find someone .agreeing with my opinion

Of course, it needs to be noted that in selecting a legal view, it's being generally accepted or unaccepted among the jurists has not been considered a sine qua non; .thus, sometimes the view selected is not much advocated in legal books

For instance, to our opinion breastfeeding a baby within the first twenty one months of its birth is obligatory for a mother, although the renowned majority of the jurists ,have given legal judgment (fatwa) for its preference or excellence. Also

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to my opinion, as long as the couple remains in marriage bond, the wife cannot demand wage from her husband for breastfeeding her child, as receiving wage is only endorsed when the couple are divorced, although again the renowned majority of the .jurists agree on its permissibility

Content

Given the above explanations, the information obtained has been classified in terms :of content and categorized in three sections

(Studying Legal Problems of Breastfeeding Children (Ridha῾

In the first part of the book the following issues are discussed in ٨ chapters: the legal standing of mother's milk in Islamic texts; the length of breastfeeding; mother's duties during breastfeeding period; father's duties during breastfeeding period; parents' reciprocative duties during breastfeeding period; duties of the father's successors during breastfeeding period; how to wean a baby; how to hire a wet .nurse

(Studying Legal Problems of Custody of Children (Hidhanat

The second part begins with a preface about the legal standing of fostering children in the Holy Qur᾿an and then the following issues are discussed in four sections: preliminary discourses; processes of fostering children; qualifications for fostering .children; parents' relationships during fostering period

(Studying Legal Problems of Foundling Children (Laqit

The second part consists of the following issues: preliminary discourses; qualifications for fostering foundling children; legal problems of foundling children; penal problems concerning foundling children; disagreement over foundling children; kinship relation .with the foundling children; figurative kinship

Conclusions

point

Given the great importance of the research made about children, the conclusions :drawn in this research are summarized in the following items for the reader

(Breastfeeding and Suckling (Ridha῾

- .Mother's milk is the best for the baby

- The period for pregnancy and breastfeeding is to sum up to ۳۰ months.
-

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The mother is obliged to breastfeed her baby for ۲۱ months; however, it is recommended to continue this period up to ۲۴ months.

- In normal conditions it is not obligatory for the mother to breastfeed her baby beyond ۲۱ months.
- Breastfeeding is an obligatory act, but the mother cannot be forced to do that.
- After the separation of a couple, if the man wants her ex-wife to breastfeed their baby for a full ۲۴ months, the mother is obliged to complete the breastfeeding period.
- After separation from her husband, the woman cannot shun from breastfeeding her baby, but she can demand wages for it.
- From the beginning of breastfeeding, the mother can demand for wages proportionate to the amount of breastfeeding.
- What is meant by wages is the provision of mother's food and clothing during breastfeeding period.
- The provision of mother's food and clothing during breastfeeding period is undertaken by the father and in proportion to his financial capacity.
- The husband and the wife would both agree on the amount of the wages.
- In normal conditions, the father is not obliged to provide for the expenses of breastfeeding beyond ۲۱ months.
- A husband may pay her wife for breastfeeding during their matrimony, but he cannot be obliged to do so.

Breastfeeding a baby (ridha') is different from its custody (hidhanat); receiving •
.wages for breastfeeding does include its custody

During the period a mother is obliged to breastfeed her baby, she is not permitted to •
use supplementary foods or animal milk

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.instead of her own milk

The term "breastfeeding one's baby" is true only when the mother feed the baby •
.from her own breasts

If a woman agrees to breastfeed a baby for a lower wage than the wage its mother •
has demanded and the mother does not accept that wage (ta'asur), the father can
.take the baby from the mother and leave it to that woman

The wife and the husband should not hurt each other by using the child as bait after •
.separation

The inheritors of the father after his death have the same responsibilities towards •
.the child and its mother as the father would have had if he had been alive

In order to complete the breastfeeding period, as the father can ask the mother to •
.breastfeed the baby, he can hire a wet nurse, too

.Decision about weaning the child lies with the parents •

If a mother shuns breastfeeding her baby, she would lose her right for its custody in •
.the first two years of its life

Child Custody

What is meant by custody is taking care of the child; deciding on instances counted •
.as taking care is subject to conventional understanding

Parents' custody of the child is their natural and unconditional right, which is created •

as soon as the filial relationship is realized, is not transferable to others, and cannot .be relinquished

- As the parents have the right to take care of their own child, the child has also the right to be taken care of and raised

p: ١٠

.by its parents

- Child custody is a father's intrinsic duty, which is transferred to the mother for a .limited (at most seven years) period
- Mother's priority in breastfeeding and taking care of her baby in its first two years of life is on the condition that she does not receive wages for this or the wages she .demands do not exceed what the others demand
- After separation from her husband, the woman has the right to take care of her .child, whether it is a boy or a girl, up to the age of seven
- The mother can receive wages for breastfeeding her baby, but not for taking care of .it
- In case of mother's death while holding the custody of her child, this duty is .transferred to the child's father
- When the father dies while holding the custody of his child, this duty is transferred to .(his successor, i.e., the child's paternal grandfather or his executor (wasi
- Guardianship of a child is different from its custody; this duty lies with the father, paternal grandfather, executor (wasi) of each one of them, and Islamic ruler, .respectively
- Taking care of a child after its parents' death lies with its paternal grandfather, his .specified executor, and then the Islamic ruler

- A non-Muslim mother has the right to take care of her child.
- Mother's chronic insanity inhibits her from the custody of her child.
- Mother's periodic insanity does not inhibit her custody over the child in case she is able to fulfill her

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duties of taking care of the child and the number of its recurrence is very few and not too lengthy.

- Mother's marriage during her child's first seven years of life nullifies her custody over her child, whether her marriage takes place during her ex-husband's lifetime or after his death and whether her second husband agrees with taking care of the child or not.
- Mother's separation from her second husband does not restore her right of custody.
- Mother has to be trustworthy for the custody of her child; namely, she must not misappropriate or fall short of the issues related to her child's life.
- Mother is required to be morally qualified to be allowed the custody of her child.
- Change of the child's residence is permitted in case it does not have negative impacts on its life trend, physical, mental, educational well-being, and moral conduct.
- When the mother is suffering a contagious disease, she cannot undertake her child's custody so long as she is not cured.
- When the mother is suffering from a chronic disease so that she is not able to take care of her child even with the help of others, her right to custody remains valid; however, when it is by no means possible for the mother to take care of the child, this right is voided.
- The parents share the conditions for custody, except in case of the mother's

.marriage

- When the terms and qualifications for custody are lost during infancy, mother's right to custody is transferred

p: ١٢

.to the father

- When the father loses the qualifications for his child's custody, it is transferred to the .paternal grandfather and then to their executor
- If the father regains the required qualifications for his child's custody, it is entrusted .to him
- If the mother regains the required qualifications for her child's custody, it is transferred to her for the first seven years of the child's life, except in case of .marriage
- While the child is living with its father, the latter must not inhibit the mother from meeting her child, and if the child gets sick, he must not prevent the mother from nursing it. In addition, when either the mother or the child dies, the father must not .prevent the other from taking part in the mourning ceremony
- Once reaching maturity, the child's custody is terminated and it can make its own decisions, with no difference in this injunction between a boy and a girl (whether virgin .(or non-virgin

Custody of the Abandoned Children

- What is meant by an abandoned child (foundling) is the girl or the boy who has had no specified guardian when found, whether a suckling or a non-suckling, provided .that it is not near maturity
- Adopting and taking care of the abandoned children is a preferable religious act, which will become obligatory if their life is endangered. This obligation can on certain

.conditions be individual or shared

There is no need for asking permission from any authority for adopting an • abandoned child, although some conditions must be observed for

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.its custody

There is no need for asking someone to act as witness for finding an abandoned • .child; however, it is better to have a witness

The finder of an abandoned child only undertakes to take care of the child and does • .not have any guardianship (wilaya) over the child

The underage, insane, and feeble-minded who are in need of custody themselves • cannot undertake the custody of an unattended child, although they can pick the .abandoned baby from public places and hand it over to the related institutions

.Finding an abandoned child does not create any right for the finder •

Decision about the custody of an abandoned child to be entrusted to someone is • made by a specific organization that examines the required qualifications of the .person for this purpose

There is no need for justice in its technical meaning (the habit of avoiding sins) for • taking care of an unattended child; however, the person is required to be morally .qualified

Being a Muslim is a condition for the custody of a child, whether the child is a Muslim • or a non-Muslim; however, the validity of the faith (being a Shiʽa) is not far from truth, .either

The non-Muslim and Muslim individuals with corrupt faith cannot take the custody of • .an unattended child

• The custody of a non-Muslim abandoned child (found in non-Muslim settlements) is entrusted to a Muslim person.

• Financial capability is not a prerequisite for the custody of an unattended child, although among several people with equal qualifications,

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being wealthy is a privilege.

• Moving the residence of an unattended child is subject to the best physical and mental interest of the child.

• Being a man or a woman does not have any effect on the permission for the custody of an abandoned child.

• The property used by or carried along with the child belongs to it.

• The properties [found] around the abandoned child do not belong to it, unless there are valid evidences proving otherwise, or when they lie in a place dedicated to the child.

• The one who takes care of the abandoned child can use the child's property to provide for its living expenses without needing to ask permission from the Islamic ruler.

• An overseer is required to be around for supervising the correct expenditure of the child's property.

• If the finder of the child picks it up from the street just for the purpose of saving its life, provision of its living expenses lies with Islamic government.

• If the finder of the child collects it from the streets for taking care of it with unlimited responsibility, provision of the child's expenses is upon the finder.

• If the finder of the child collects it from the streets for taking care of it with limited

responsibility, provision of the child's expenses is subject to the kind of the finder's undertaking, i.e., free care or care on the condition that the expenses are paid back .after the child's maturity

In case the finder of the child undertakes to •

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provide for the child's living expenses on the condition that he would be paid back later on and when the child reaches maturity there arises disagreement between them on the amount of the expenses, then if the overseer confirms the finder's claim, his claim would be accepted, whether he spends from the child's property or form his .own; otherwise he has to provide evidence to prove his claim

In a deliberate or inadvertent crime perpetrated against abandoned children, • whether leading to death or injury, decision about retaliation (qisas), pardon, or receiving blood money (diya) is to be made by the Infallible Imam (Islamic .(government

Proof of parental relation to an abandoned (unattended) child is not possible merely • .by claim; rather, referring to their national identification records is needed to prove it

In case the parental relation to the abandoned child cannot be proved, medico- • .scientific procedures are to be exploited

Acceptance or denial of kinship with someone by the child after maturity is not valid • .by itself

The religion of the claimant of kinship with the abandoned child is not effective in • .accepting or rejecting its claim

The finder of the abandoned child or the one who takes care of it does not have any • .natural (qahri) guardianship (wila') over it

Saed Nazari Tavakkoli

,Mashhad, Iran

September ۲۹, ۲۰۰۲

[sntavakoli@ferdowsi.um.ac.ir [۱۳

(Part One: A Study on the Legal Issues of Breastfeeding (Ridha ٔ

Legal Standing of Mother's Milk in Islamic Texts

point

Human need for nutrition begins since the ovary is formed in the mother's uterus, a .need which increases as time passes

According to the latest scientific achievements, no food is more nutritious for

p: ۱۶

a baby than mother's milk; as it is the best and most complete natural food that .provides for all its needs

Mother's milk is a vital liquid that can, with its property of transformability, meet a (baby's needs quite desirably in various conditions.(۱

Vitality of mother's milk is in that it contains living components such as white globules and the substances required for safeguarding and immunizing the baby against .pathogenic infections

Its transformability is because it is transformed in proportion to the baby's needs. In the early days of the baby's life, when it needs more rest, the milk is secreted in a condensed form (colostrum) so that besides providing the baby's nutritional and .immunity needs, it would befit its stomach size

Constituents of Mother's Milk

point

Mother's milk, with its six nutritional components, is produced and secreted according .to the baby's need

:These components are as follows

Protein Substances .۱

As we know there are two kinds of important proteins in the milk of the mammals: casein with large clots, very hard to digest as befitting animals' digestive system; proteins with small clots which are easily digested and their ratio in mother's milk is ۸۰ .to ۲۰

Therefore, the proteins existing in mother's milk is of best quality for digestion and absorption by the infant and greatly contributes to its optimal growth and .development

Fatty Substances .۲

The fats contained in mother's milk are more of the kind of fats needed for brain .structure, which fully satisfies the infant's nutrition needs

Furthermore, since mother's milk naturally contains more cholesterol, it operates the cholesterol metabolism system of the body

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It is to be pointed out that there are other definitions of mother's milk, too, such as: -۱ The liquid that is secreted from mammals' mammary gland and used by their newborn. It is a whitish liquid, slightly sweet, and with a specific odor. It is a serum .containing fat, organic materials, diastase, and white globules

more desirably. As a result, the babies who have been breast-fed for over a year would be protected from the risk of increased cholesterol, blood pressure, and the related cardiovascular disorders in their middle age; or would be less prone to such (maladies than other people.(۱

(Sugary Substances (Hydrocarbons .۳

Mother's milk synthesis is different from other milks in the amount and type of sugar .matters

The sugar in mother's milk is lactose. This substance increases the absorption of .calcium in the infant's intestine and improves its bone growth process

In addition, the lactose in the mother's milk lessens the infant's constipation, and thus .eases its bowel movements

Also, due to the interaction of this sugar matter with other substances, the useful microbes of the intestine further grow and multiply and with the secretion of an acid substance, create an inappropriate environment for the pathogenic microbes to grow .and prevent digestive disorders

Water .۴

The amount of water in mother's milk is sufficient to liquefy with appropriate density .so that the infant would not need extra water

For this reason during the first five months that the infant is breastfed only with .mother's milk, it does not need water beside the milk

The amount of water in mother's milk is so much that if the infant is afflicted with diarrhea for any reason, it will be safe against lowering of body water (dehydration), .which is the major incidence of diarrhea

Vitamins .۵

Mother's milk contains various kinds of vitamins dissolved in water and fat;(۲) and since this milk is fed fresh and without being heated, it

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It is noteworthy, of course, that since the mother's milk fats are secreted more at – ۱

the end of each breastfeeding period she had better feed her baby in each period .with all the milk of her breasts

It is worth mentioning that all vitamins except vitamin k are found in mother's milk; -۲ however, their amount is varied and mother's complementary nutrition would further increase their excretion. See: Williams, Pregnancy and Childbirth, tras. Bahram Qadhi .Jahani, ۲۱st edition, Golban Publication ۱/۴۱۱

contains the highest amount of vitamins, for most of these vitamins are ruined and .rendered useless when heated over ۶۰° C

Salts and Minerals .۶

The minerals existing in mother's milk are quantitatively compatible with the infant's .urinary system and kidneys

Such salts as calcium, phosphorus, sodium, and potassium exist in mother's milk to the extent that while providing for bone growth, nervous system, and other tissues and satisfying the baby's natural needs, they do not impair the kidneys' discharge of .urine

The minerals existing in mother's milk are of such high quality that they satisfy the .body's structural needs through better absorption

In any case, the researches indicate that feeding the babies with human milk would reduce the incidence or intensity of diarrhea, the infection of lower respiratory .system, and the urinary system

In addition, mother's milk is protective against sudden infant death syndrome, insulin-dependnt sweet diabetes, allergic diseases, and other chronic digestive problems.(۱)

The Value of Mother's Milk in Religious Texts

What is perceived from a study of Islamic texts concerning mother's milk is the very important conclusion that mother's milk is the best and the most perfect food for a .baby, and that nothing, even other natural animal milks, can be substituted with it

Besides the attention paid by the jurists in legal texts(۲), the importance of mother's milk has been brought up in hadith sources and many traditions have stressed its .importance in the form of short statements related to us from the Infallible Imams

The Holy Prophet of Islam (S.A.W.) describes mother's milk as follows: "There is no better milk for an infant than mother's

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For more information, see: Williams, Pregnancy and Childbirth, ۱/۴۱۳; Nuri, Sayyid - ۱ Muhammad Ridha, Taghdhiya-yi Madar wa Kudak, Shahidipur Publication, Mashhad, .۱۴۲۳/۲۰۰۲, pp. ۳۸-۴۷

Ibn Barraj Tarablusi, Qadhi ʿAbd al-ʿAziz, Al-Muhadhdhab, ۲ vols. ed. Jaʿfar - ۲ Subhani, Jamiʿa-yi Mudarrisin, Qum, ۱۴۰۶/۱۹۸۶, ۲/۲۶۱; Makki, Makki, Muhammad b. Mansur, Al-Sara'ir al-Hawi li Tahrir al-Fatawi, ۳ vols. ۲nd ed, Muʿassisa-yi Nashr-i Islami, Qum, ۱۴۱۰/۱۹۹۰., ۲/۶۴۸; Hilli, Jaʿfar b. Hasan, Al-Mukhtasar al-Nafiʿ fi Fiqh al-Imamiyya, Hilli, Jaʿfar b. Hasan, Al-Mukhtasar al-Nafiʿ fi Fiqh al-Imamiyya, ed. ʿAli Akbar Ghaffari, ۷ vols, ۲nd edition, Tehran, Saduq Publication, ۱۳۹۷/۱۹۷۷, p. ۱۹۴; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz fi Sharh al-Mukhtasar al-Nafiʿ, ed. Ishtahardi, ۲ vols. ۱st edition, Nashr-i Islami Publication, Qum, ۱۴۱۰/۱۹۸۹, ۲/۲۰۰; ʿAllama Hilli, Qawaʿid al-Ahkam fi Maʿrifat al-Halal wa al-Haram, ۳ vols. ۱st edition, Nashr-i Islami Publicatrion, Qum, ۱۴۱۳/۱۹۹۲., ۳/۱۰۱; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Nihaya fi Mujarrad al-Fiqh wa al-Fatawa, Dar al-Andulus, Beirut, n.d., p. ۵۰۳; Ibn Fahd Hilli, Al-Muhadhdhab al-Bariʿ fi Sharh al-Mukhtasar al-Nafiʿ, ed. Mujtaba ʿIraqi, ۵ vols. Nashr-i Islami Publication, Qum, ۱۴۰۷/۱۹۸۷, ۳/۴۲۴; ʿAmili, Muhammad, Nihayat al-Maram fi Sharh-i Mukhtasar Shara'iʿ al-Islam, ed. Mujtaba ʿIraqi, ۲ vols. ۱st edition, Nashr-i Islami Publication, Qum, ۱۴۱۳/۱۹۹۳, ۱/۴۶۰; Fadhil Hindi, Muhammad b. Husayn, Kashf al-Litham, ۲vols. Ayatollah Marʿashi Library, Qum, ۱۴۰۵/۱۹۸۴, ۲/۱۰۵; Bahrani, Yusuf, Al-Hada'iq al-Nadhira fi Ahkam al-ʿItrat al-Tahira, ed. Muhammad Taqi Iravani, ۲۰ vols. Nanshr-i Islami Publication, Qum, ۱۴۰۱۴/۱۹۸۴, ۲۵/۷۱; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il fi Bayan al-Ahkam bi al-Dala'il, ۲ vols. Al al-Bayt Institute, Qum, ۱۴۰۴/۱۹۸۳, ۲/۱۶۰; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik fi Sharh al-Mukhtasar al-Nafiʿ, ed. ʿAli

.Akbar Ghaffari, ۷ vols, ۲nd edition, Tehran, Saduq Publication, ۱۳۹۷/۱۹۷۷, ۴/۴۶۸

milk."(۱) Similarly, Imam 'Ali (A.S.) is quoted as saying: "No milk is more blessed than mother's milk for the infant."(۲)

Thus, if not saying breastfeeding a baby is an obligation upon the mother – which we will explain later on – it is, at least, recommendable and desirable (musthab), which is evidenced by its compatibility with the baby's body.(۳)

(The First Milk (Colostrum

Colostrum is a condensed liquid with a lemon yellow color which is the first milk excreted from the breast. This liquid which is called aghuz (in Persian) excretes from the nipples from the second day of childbirth and continues to excrete for five days; .during the next four weeks it gradually turns to mature milk

Comparing mother's milk, colostrum contains more minerals and proteins, which mainly consist of globin, and to less degree, sugar and fat.(۴)

The importance and nutritious-hygienic value of feeding the infants colostrum has made this issue to be brought up in legal texts and many jurists have obliged mothers to feed it to their infants, even if they may demand wages for it, since the baby's survival is dependent upon eating it.(۵)

In contrast, some people criticize this claim and reject it as untrue, maintaining that the baby can survive without eating the colostrum, for it can be breastfed after birth by a woman other than its mother; some women do not secrete colostrum and it may so happen that breastfeeding the colostrum would not be possible because of the mother's illness.(۶)

Paying attention to these points has made some great jurists claim

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۱- Ibn Babuwayh Qummi, 'Uyun Akhbar al-Ridha (A.S.), ۲ vols. ۱st edition, Mu'assisat

.al-Aʻlami li al-Matbuʻat, ۱۴۰۴/۱۹۸۴, ۱/۳۸, No. ۶۹

Kulayni, Muhammad b. Yaʻqub, Usul al-Kafi, ed. ʻAli Akbar Ghaffari, ۸ vols. ۳rd - ۲
.edition, Dar al-Kutub al-Islamiyya, Tehran, ۱۳۸۸/۱۹۶۸.۶/۴۰, No. ۱

Muhaqqiq Hilli, Shara'iʻ al-Islam fi Masa'il al-Halal wa al-Haram, ۴ vols. ۲nd edition, -۳ Istiqlal Publication, ۱۴۰۹/۱۹۸۸, ۲/۵۶۶; ʻAllama Hilli, Irshad al-Adhhan ila Ahkam al-Iman, ed. Shaykh Faris al-Hassun, Nashr Islami Publication, ۲/۴۰; Shahid Awwal, Muhammad b. Makki ʻAmili, Al-Lumʻat al-Damishqiyya, ۱st edition, Dar al-Fikr, Qum, ۱۴۱۱/۱۹۹۰, p. ۱۷۶; ʻ Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Masalik al-Afham ila Tanqih Shara'iʻ al-.Islam, Mu'assisa Maarif Islami, Qum, ۱۴۱۳/۱۹۹۳., ۸/۴۲۰

Williams, Pregnancy and Childbirth, ۱/۴۱۰; also, see: Paknejad, Sayyid Ridha, Avvalin -۴ Danishgah va Akhirin Payambar, Shahid Dr. Paknizhad Cultural Foundation, Yazd, .۱۴۰۵/۱۹۸۵. ۶/۸۲-۸۳

Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Al-Rawdhat al-Bihiyya fi Sharh al-Lumʻat al- -۵ Damishqiyya, ۱۰ vols., ۲nd edition, Dawudi Publication, Qum, ۱۳۹۸/۱۹۷۸, ۵/۴۵۲; ʻAllama .Hilli, Qawaʻid al-Ahkam ʻ, ۳/۱۰۳; idem, Idhah al-Fawa'id, ۳/۲۶۲

Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, Isfahan, n.d., p. ۱۹۳; - ۶ Najafi, Muhammad Hasan, Jawahir al-Kalam fi Sharh Shara'iʻ al-Islam, ed. Shaykh ʻAbbas Quchani, ۴۳ vols. ۳rd edition, Dar al-Kutub al-Islamiyya, Tehran, ۱۴۰۹/۱۹۸۸, ۳۱/۲۷۳; Ardabili, Mulla Ahmad, Majmaʻ al-Fa'ida wa al-Burhan fi Sharh-i Irshad al-Adhhan, ed. Ishtahardi, ۱۴ vols. Jamiʻa-yi Mudarrisin, Qum, ۱۴۰۳/۱۹۸۳., ۸/۲۶۰; Bahrani, .Yusuf, Al-Hada'iq al-Nadhira ʻal-Tahira, ۱۹/۴۲۴

that the baby's life is dependent upon taking colostrum milk in most but not all instances; besides, taking this milk makes the baby's body stronger and more (vigorous.(۱

Regardless of the reasons proposed by the proponents and critics of obliging mothers to feed their infants colostrum, feeding this milk to infants is so important that a group of Shiʻa jurists have given fatwa (a legal edict) that if a woman is sentenced to qisas (retaliation punishment) or lapidation (stoning to death) for murder or other criminal acts, the execution of the punishment should be postponed so that the mother could feed the infant colostrum, reasoning that the infant's livelihood is dependent upon the

intake of colostrum, as the infant is often unable to survive without it; hence, observing the infant's rights and safeguarding his life.(۲)

According to some, the execution of qisas can be postponed until the end of the two-year period of breastfeeding; and if no wet nurse is found to breastfeed the infant after it had colostrum from its mother, this postponement is even preferable (mustahab), for the infant may not accept milk other than its mother's.(۳)

This claim is testified by the traditions the Shiʿa transmitters of hadith have related about the way the Holy Prophet (S.A.W.) and Amir al-Mu'minin ʿAli (A.S.) have dealt with this issue.(۴)

It is to be mentioned that no specific time is determined in the religious texts for the legal obligation of feeding the infant colostrum; although some have limited it to three days.(۵)

How to Breastfeed the Baby

As the religious

۱- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdha al-Bihiyya ʿ, ۵/۴۵۴; idem, Masalik al-Afham ila Tanqih Shara'iʿ al-Islam, ۸/۴۱۳; Fadhil Hindi, Muhammad b. Hasan, Kashf, ۲/۱۰۵.

۲- Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid fi Sharh al-Qawaʿid, ۱۳ vols. ۱st edition, Al al-Bayt Institute, Qum, ۱۴۰۸/۱۹۸۷. ۴/۱۵۸; Tabataba'i, Sayyid ʿAli Riyadh, al-Masa'il ۱/۵۶۵; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۱۰/۱۰۰; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham Shara'iʿ al-Islam, ۱۵/۲۵۲.

۳- ʿAllama Hilli, Qawaʿid al-Ahkamʿ, ۳/۶۲۸; Hilli, Muhammad b. Hasan, Idhah al-Fawa'id fi Sharh Ishkalat al-Qawaʿid, ۴ vols. ۱st edition, ʿIlmiyya Publications, Qum, ۱۳۸۷/۱۹۶۷, ۴/۶۲۹; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Shara'iʿ al-Islam Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۵/۲۲۴.

۴- Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۷/۱۸۵, No. ۱; Ibn Babuwayh Qummi, Man la

Yahdhuruhu al-Faqih, Man la Yahdhuruhu al-Faqih, ed. ʿAli Akbar Ghaffari, Jamiʿa-yi Mudarrisin, Qum, ۱۴۰۴/۱۹۸۴, ۴/۳۲; Tusi, Abu Jaʿfar Muhammad b. Hasan, Tahdhib al-Ahkam fi Sharh al-Muqniʿa, ed. Akhundi, ۱۰ vols. ۴th edition, Al-Maktabat al-Murtadhawiyya, Tehran, ۱۳۸۷/۱۹۶۷, ۱۰/۹, No. ۲۳; Darimi, ʿAbd Allah b. Bahram, Sunan al-Darimi, ۲ vols. Matbaʿt al-Iʿtidal, Damascus, n.d., ۲/۱۷۹; Ibn Hanbal, Ahmad Musnad, Dar Sadir Beitut, n. d., ۵/۳۴۸; Muslim, Sahih, ۳/۱۳۲۳, No. ۲۳, Abi Dawud Sajistani, Sulayman b. Ashʿath, Sunan Abi Dawud, ed. Saʿid Muhammad al-Lahham, ۲ vols. ۱st edition, Dar al-Fikr, Beirut, ۱۴۱۰/۱۹۹۰, ۴/۱۵۲, No. ۴۴۴۲.

۵- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۵/۴۵۲.

dignitaries have recommended, it is preferable (mustahab) for the mother to breastfeed the baby from her both breasts. The Holy Prophet (S.A.W.) of Islam said in this respect: "Allah, the exalted, has placed the infant's daily sustenance in the mother's two breasts; water in one and food in the other".(۱) Similarly, Imam al-Sadiq (A.S.) said to a woman who was breastfeeding her two babies at the same time: "Do not feed them from one breast, feed them from both, as one is water [provides water] and the other food".(۲)

Breastfeeding Time

The Holy Qur'an has stressed through several verses on being kind to one's parents.(۳) Meanwhile, in two verses, it has pointed out the mother's difficulties during pregnancy, the length of pregnancy, and breastfeeding.

The holy Surat al-Ahqaf (۴۶), considers the length of pregnancy and breastfeeding to be thirty months altogether:

(We have enjoined man to be kind to his parents. His mother has carried him in travail, and bore him in travail, and his gestation and weaning take thirty months). (۴۶:۱۵).

Obviously, if the pregnancy period fluctuates between six to nine months – as pointed out in some traditions(۴) – the breastfeeding period may vary between twenty one to twenty four months to sum up to thirty months.(۵)

It goes without saying that since according to scientific findings and Islamic instructions concerning the end of pregnancy period, from among the four choices of six to nine months only three

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۱- Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۴/۴۱۳-۴۱۴, No. ۵۹۰۱.

۲- Kulayni, Muhammad b. Yaʿqub Al-Kafi, ۶/۴۰, No. ۲; Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۴۷۵, No. ۴۶۶۴; Tusi, Abu Jaʿfar Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۱۰۸, No. ۳۶۶.

۳- For more details, see: Q. ۲:۸۳; ۴: ۳۶; ۶: ۱۵۱; ۱۷: ۲۳; ۲۹: ۸.

۴- Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۵/۵۶۳, No. ۳۲ and ۶/۸۲, No. ۳; Tusi, Abu Jaʿfar Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۱۱۵, No. ۳۹۴.

۵- See: Mufid, Muhammad b. Nuʿman, Al-Irshad fi Maʿrifat-i Hujaj Allah ʿala al-ʿIbad, Al al-Bayt (ed.), Qum, Dar al-Mufid, ۱۴۱۳, ۱/۲۰۶; Tamimi, Nuʿman b. Muhammad, Daʿa’im al-Islam wa Dhikr Halal wa al-Haram wa al-Qadhaya wa al-Ahkam ʿan Ahl-i Bayt Rasul Allah ʿAlyhi wa ʿAlayhim Afdhal al-Salam, ۲ vols. Dar al-Maʿarif, Egypt, ۱۳۸۳/۱۹۶۳, ۱/۸۶; Hurr ʿAmili. Muhammad Hasan, Wasa’il al-Shiʿa ila Tahsil Masa’il al-Shariʿa, ed. Rabbani, ۲۰ vols. Dar Ihya’ al-Turath al-ʿArabi, Beirut, n.d., ۱۵/۱۱۷; Bayhaqqi, Ahmad b. Husayn, Al-Sunan al-Kubra, ۱۰ vols. Dar al-Fikr, Beirut, n.d., ۷/۴۴۲; Sanʿani, ʿAbd al-Razzaq, Al-Musannaf, ed. Habib al-Rahman Aʿzami, ۱۱ vols. ۲nd edition, Jamiʿa-yi Mudarrisin, Qum, ۱۴۰۴/۱۹۸۴, ۷/۳۵۰, No. ۱۳۴۴۴ and ۳۵۲, No. ۱۳۴۴۹; Zarandi Hanafi, Muhammad, Nazm al-Durar al-Simtayn fi Fadha’il al-Mustafa wa al-Murtadha wa al-Batul wa al-Sibtayn, Imam Amir al-Mu’minin (A.S.) Library Publication, ۱۳۷۷/۱۹۵۹, p. ۱۳۱.

choices, i.e. ۶, ۷, and ۹ month periods are feasible(۱), therefore the breastfeeding period may vary between ۲۱, ۲۳, and ۲۴ months.

The variation of breastfeeding period to be between ۲۱ to ۲۴ months – which of course exceeds one year – can be understood from aya ۱۴ of Surat Luqman (۳۱), where the Almighty Allah mentions that weaning a baby takes place within two years:

We have enjoined man concerning his parents: His mother carried him through(weakness upon weakness, and his weaning takes two years. Give thanks to Me and to .(your parents. To Me is the return.) (۳۱:۱۴

The Length of Breastfeeding

Given the above explanations, the length of a mother's breastfeeding her baby is not to be less than twenty months, as according to what is related by 'Abd al-Wahhab b. al-Sabah and Suma'a(۲), Imam al-Sadiq (A.S.) asserts, using the two words fardh (obligation) and jawr (wrong), that the mother is obliged to breastfeed her baby for twenty one months and if she contents herself with less than that, she has wronged (her baby.(۳

Then, claiming that the minimum length of breastfeeding is not distinct and depends .on the baby's need and the impact on its health(۴), is totally baseless

Of course, it is clear that, according to the practical principle of exemption, the mother has no obligation to breastfeed her baby more than this length of time(۵), and if she does – as it is asserted in the traditions related by Ash'ari and Halabi(۶) – the father does not have to

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Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۶/۵۲, No. ۲; Tusi, Abu Ja'far Muhammad b. -۱ .Hasan, Tahdhib al-Ahkam, ۸/۱۱۵, No. ۳۹۴

.Tusi, Abu Ja'far Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۱۰۶, No. ۳۵۷-۳۵۸ -۲

.Bahrani, Yusuf, Al-Hada'iq al-Nadhira 'al-'Itrat , ۲۵/۷۹ -۳

Tabarsi, Fadhl b. Husayn, Majma' al-Bayan fi Tafsir al-Qur'an, ۱۰ vols. Dar Ihya al- -۴ .Turath al-'Arabi, ۱۳۷۹/۱۹۶۰, ۲/۱۱۳

Ibn Fahd Hilli, Al-Muhadhdhab al-Bari' '' ۳/۴۲۴; 'Amili, Sayyid Muhammad, Nihayat -۵ al-Maram, ۱/۴۶۲; 'Allama Hilli, Tadhkirat, ۲/۶۲۷; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, ۵/۴۵۶; Fadhil Hindi, Muhammad b. Hasan Kashf al-Litham, ۲/۱۰۵; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, ۲/۱۶۰; Najafi, Muhammad Hasan, Jawahir, .۳۱/۲۷۷

Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/۴۱, No. ۸; Tusi, Abu Jaʿfar Muhammad b. -۶ .Hasan, Tahdhib al-Ahkam, ۸/۱۰۷, No. ۳۶۳, ۱۰۵, and ۳۵۵

pay for the surplus of the twenty one months of breastfeeding(۱), unless the baby is in need of its mother's milk further than that for a specific reason such as illness, in which case the father is obliged to pay her for the whole period of breastfeeding, as (this is part of the baby's necessary expenditure which is upon the father to pay.(۲

Mother's Duties in Breastfeeding Period

In the two verses(۳) explained in previous chapter, it was only stated that the total sum of pregnancy and breastfeeding periods are thirty months and breastfeeding is .done within two years, without giving any further explanation as to how it is done

However, the Holy Qur'an, as the major and most important source of Islamic legislation, examines in detail in two other verses(۴) the issue of breastfeeding the infant – of course, while stating the situation of the women who have separated from .their husbands

The Qur'an's silence in stating the ordinances for breastfeeding a baby and the way the three members of family, i.e., father, mother, and the child are related, while a matrimonial relationship is established between the parents, strikes the mind that the .clarity of the ordinance for this issue was the reason for not bringing it up

The way the parents treat their children, both during infancy and after that, seems to be so self-evident that there is no need to be stated; however, it is in divorce and when the marriage bond is for any reason broken that raising this issue becomes .seriously necessary

From verse ۲۲۷

Mufid, Muhammad b. Muhammad, Al-Muqniʿa, Muʿassisa Nashr Islami, ۱۴۱۰, p. ۵۳۰; -۱ Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Nihaya, p.۵۰۳; Ibn Barraj Trablusi, Qazi ʿAbd

al-ʻAziz, Al-Muhadhdhab, ۲/۲۶۳; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۶۴۸; Muhaqqiq Hilli, Shara'iʻ al-Islam, ۲/۵۶۶; Hilli, Jaʻfar b. Hasan, Al-Mukhtasaral-Nafiʻ , p. ۱۹۴; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz ۲/۲۰۰; ʻAllama Hilli, Qawaʻid al-Ahkam ʻ, .۳/۱۰۱; idem, Tahrir al-Ahkam, ۲ vols. Al al-Bayt Institute, Mashhad lithography, n.d. ۲/۴۳ ʻAmili, Sayyid Muhammad Nihayat al-Maram, ۱/۴۶۴; Fadhil Hindi, Muhammad b. - ۲ .Hasan, Kashf al-Litham, ۲/۱۰۶

.Q. ۳۱: ۱۴; ۴۶: ۱۵ -۳

.Q. ۲: ۲۳۳; ۶۵: ۶ -۴

of Surat al-Baqarah onward, the Qur'an has examined the issue of divorce. In these verses such issues as divorce permit, ʻidda (waiting period after divorce), husbands' priority in returning to their ex-wife, times of divorce, the way to treat divorced .women during the ʻidda period and after that are explained

The question remains to be raised that if a man divorces his wife while having a suckling baby or being pregnant, what obligations are upon him toward his wife and ?baby. What has the mother to do in this situation

God has answered this question and said about the women with a suckling baby who :have separated from their husbands. He says

Mothers shall breastfeed their children for two full years, that for such as desire to(complete the breastfeeding and on the father shall be their maintenance and clothing, in accordance with honorable norms. No soul is to be tasked except according to its capacity: neither the mother shall be made to suffer harm on her child's account, nor the father because of his child, and on the [father's] heir devolve [duties and rights] similar to that. And, if the couple desire to wean, with mutual consent and consultation, there will be no sin upon them. And if you want to have your children wet nursed, there will be no sin upon you so long as you pay what you give in accordance with honorable norms, and be wary of Allah, and know that Allah sees best what you

.(do.) (۲: ۲۳۳

This verse contains several issues as follows, respectively: breastfeeding the baby for two full years; providing divorced mother with her maintenance during breastfeeding period; Divine tasks as being proportionate to human capacity; forbidding fathers to inflict harm on mothers, or mothers on fathers, and both on children. As well as the responsibility of the father's heir after his death to provide for mother's maintenance; permission to wean the child with mutual consent and consultation by both parents; permission to have one's children wet nursed in accordance with their financial rights; .necessity of being wary of Allah; Allah's mastery over all human actions

Similarly, concerning the women who get divorced from their husbands in their :pregnancy, Allah says

House them where you live, in accordance with your means, and do not harass them(to put them in straits, and should they be pregnant, maintain them until they deliver. Then, if they breastfeed [the baby] for you, give them their wages and consult together honorably; but if you make things difficult for each other, then another woman will breastfeed [the baby] for him. Let the affluent man spend out of his affluence, and let he whose provision has been tightened spend out of what Allah has given him. Allah does not task any soul except [according to] what He has given it. .(Allah will bring about ease after hardship.) (۶۵:۶-۷

This verse has examined within nine statements the rulings concerning the residence of the divorced women during their ʿidda period. After

separation from their husbands and the way their ex-husbands are to treat them, providing a pregnant woman with her living expenses after separating from her husband until delivery. Paying wages to mothers during their breastfeeding period, .the amount of the payment and their interrelation after separation

Since issues relating to the residence of the divorced women during their ʿidda period after divorce as well as their financial problems in this period are beyond the main framework of the present book, we avoid examining the details, and suffice to state

that according to the Qur’an, the man is obliged to provide his divorced wife with residence during the time she passes her ʿidda period; similarly, if she is pregnant, he .has to provide her with her living expenses until delivery

However, the main theme of our discussion includes the fourth statement of the above verse onward in which such issues as paying mothers for breastfeeding during the period after separation and the way the man and woman interrelate are .examined

The Holy Qur’an has separately discussed the issues concerning baby breastfeeding and the parents' duties during the time after their separation, depending on whether it is before or after the childbirth. However, there are many content similarities among the details of these two subjects, that we will bring up these details according to their content and examine the statements of the above two verses as per our subject of .discourse

Mother's Duties during Breastfeeding Period

The Holy Qur’an has dealt with mothers' duties during the breastfeeding period in the following

p: ۲۷

statement: (Mothers shall breastfeed their children for two full years, that for such as desire to complete the breastfeeding). Since the study of legal rulings deduced from this statement is based on correct understanding of the meaning of the terms used in it, we will follow the juridical discourses of this section while assessing the meaning of .the terms

The term walidat is the plural form of walida. Walida and umm are both used in Arabic as meaning mother, with the difference that walida is used for a woman who has given birth to a child, but umm is used for grandmother, too(۱); and as the former is characterized by childbirth, it is normally associated with breastfeeding and infancy.(۲)

Walidat apparently includes all women who have given birth to their children and

breastfeed them. In addition, it seems to mean only the women who have separated from their husbands and have infants(٣), for there must be a logical relation between this verse and the verses before and after that as well as a semantic consistency .within the statements of the verse itself

There are statements in this verse, which are definitely about divorced women and cannot include all women. For example, as agreed by all interpreters, the statement (on the father shall be their maintenance and clothing) merely concerns the women who have separated from their husbands, for the obligation of paying maintenance and providing the woman with her expenses, given the continuance of matrimony, is because of the continuing marriage bond, rather

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١- Tabataba’i, Muhammad Husayn, Al-Mizan fi Tafsir al-Qur'an, Ismaʿiliyan Institute, Qum, ١٣٩٣/١٩٧٣, ٢/٢٥١; Taliqani, Sayyid Mahmud, Partuwi az Qur'an, Shirkat Sihami .Intishar, ١٣٩٩/١٩٧٩, ٢/١٥۶

٢- Musawi Sabzwari, ʿAbd al-ʿAli, Mawahib al-Rahman fi Tafsir al-Qur'an, ۴ vols. Matbaʿat al-Adab, ١۴٠۴/١٩٨٣, ۴/۵٨; Raghib Isfahani, Al-Mufradat fi Gharib al-Qur'an, ١st edition, Daftar-i Nashr-i Kitab, ١۴٧٠۴/١٩٨۴, p. ۵٣٢; Turayhi, Fakhar al-Din, Majm-ʿal-.Bahrayn, Murtadhawi, Publication, ١٣۶۵, ٣/١۶۴

٣- Bayhaqi, Ahmad b. Husayn, Sunan, ٧/۴۴٢; Ibn Jawzi, ʿAbd al-Rahman, Zad al-Masir fi ʿIlm al-Tafsir, ٨ vols. ١st edition, Dar al-Fikr, Beirut, ١۴٠٧/١٩٨۶, ١/٢۴٠; Suyuti, Jalal al-Din, Al-Durr al-Manthur fi Tafsir bi al-Ma’thur, ۶ vols. ١st edition, Dar al-Fikr, Beirut, ١٣۶۵/١٩۴۶, ١/٢٨٧; Ibn Hajar ʿAsqalani, Fath al-Bari Sharh Sahih al-Bukhari, Dar al-Maʿrifa, Beirut, n.d., ٩/۴١٧; Tabari, Muhammad b. Jarir, Jamiʿ al-Bayan ʿan Ta’wil Aya al-Qur'an, ed. Sidqi Jamil al-ʿAttar, ٣٠ vols. Dar al-Fikr, Beirut, ١٣٧٩/١٩۶٠, ٢/۶۶۴; Sanʿani, Al-Musnaf, ٧/۵٧, No. ١٢١٧٣. For more information on other views in this respect as well as about the objections toward it, see: ١. All breastfeeding mothers in general: Sabzwari, Muhammad, Al-Jadid fi Tafsir al-Qur'an, ١st edition, ٧ vols., Dar al-Hadith, Beirut, ١۴١۵/١٩٩۵, ١/٢٨۶; Mashhadi, Mirza Muhammad, Kanz al-Daqa’iq wa Bahr al-Al-Ghara’ib, ١۴ vols. ١st edition, Ministry of Islamic Culture and Guidance, Tehran,

۱۴۰۴/۱۹۸۸, ۲/۳۵۲; Shubbar, Sayyid ʿAbd Allah, Al-Jawhar al-Thamin fi Tafsir al-Kitab al-Mubin, ۶ vols., ۱st edition, Maktibat al-Alfayn, ۱۴۰۷/۱۹۸۷, ۱/۲۳۵; Muqaddas Ardabili, Zubdat al-Bayan fi Ahkam al-Qur'an, ed. Muhammad Baqir, Bihbudi, Al-Maktibat al-Murtazawiyya, n.d., p. ۵۵۷; Maghniyya, Muhammad Jawad, Al-Kashif, ۷ vols. ۳rd edition, Dar al-ʿIlm li al-Mala'in, Beirut, ۱۴۰۱/۱۹۸۱, ۱/۳۵۵; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin fi Ilzam al-Mukhalifin, ۱۰ vols. ۲nd edition, Islamiyya Bookstore, Tehran, ۱۳۸۸/۱۹۶۸, ۲/۲۹; ۲. Married mothers in particular: Qurtubi, Muhammad b. Ahmad, Al-Jamiʿ li-Ahkam al-Qur'an, ۲۰ vols. ۲nd edition, Mu'assisat al-Ta'rikh al-ʿArabi, ۱۴۰۵/۱۹۸۵, ۳/۱۶۰.

than for breastfeeding. In other words, provision of a woman's expenses is upon her husband, whether she is breastfeeding or not.

On the other hand, in rizquhunna (their maintenance) and kiswatuhunna (their clothing), the pronoun hunna (their) refers to alwalidat (mothers). The conformity between the pronoun and its antecedent denote the point that the same women whose provision of maintenance and clothing during breastfeeding period is upon their husbands, are obliged to breastfeed their children.

In other words, if this verse includes all mothers, there must be two portions of maintenance for the women who have separated from their husbands and at the same time breastfeed their babies. One including the expenses whose provision is undertaken by the husband through wedlock, whether breastfeeding is involved or not, and the second, the expenses whose provision is obligatory for the husbands as mandated by the verse and because of breastfeeding, whereas women in marriage bond deserve to receive only one portion of maintenance.(۱)

Yurdhiʿna is the present tense from the root radhaʿa, meaning breastfeeding from breast.(۲) Using this word denotes the point that the mother should directly undertake breastfeeding her baby, and feeding the baby with animal or industrial milk does not rule out her duty.

Although yurdhiʿna is a present tense verb, and a verb signifies an action or appearance of an attribute or state in the present or future, there is no doubt the

word yurdhiʿna in this verse could not have been used as a statement, since there are mothers who do

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۱ - Jassas, Ahkam al-Qur'an, ed. ʿAbd al-Salam Muhammad ʿAli Shahin, ۳ vols. ۱st edition, Dar al-Kutub al-ʿIlmiyya, Beirut, ۱۴۱۵/۱۹۹۴, ۱/۴۸۸.

۲ - Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Tibyan fi Tafsir al-Qur'an, ed. Ahmad Habib Qaysar ʿAmili, ۱۰ vol. ۱st edition, Dar Ihya' al-Turath al-ʿArabi, Beirut, ۱۴۰۹/۱۹۸۹, ۱/۳۳۳.

not breastfeed their babies.(۱) For this reason, in spite of its appearance as statement, it is used as imperative and demanding, which means "mothers have to (it is obligatory for mothers to) breastfeed their babies."(۲)

It is worth mentioning that even those believing that the verb yurdhiʿna does not denote the obligation of breastfeeding, they regard mother's breastfeeding her baby as obligatory in several cases due to the necessity of saving the baby's life.

۱. The baby would accept no breasts other than its mother's,

۲. The baby would survive only with its mother's milk and no other milk would befit it,

۳. No one other than its mother would be around to breastfeed it, and

۴. The baby does not have a father, it does not have any capital to pay for the mother's wage, and no one else is ready to provide it.(۳)

Although the mother is obliged to breastfeed her baby only for ۲۱ months, but if in time of separation her ex-husband wants her to complete the breastfeeding period, the mother has to feed her baby up to maximum twenty four months (two full years).

The necessity of completing the breastfeeding period to twenty-four months can be implied from the phrase (for two full years, that for such as desire to complete the breastfeeding) because:

First: what is intended by (two full years) is that the two years is not to be calculated approximately or with compromise; rather, care must be taken that the mother breastfeed her baby for two full years (twenty four

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Jassas, Ahkam al-Qur'an, ۱/۴۸۸; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Tibyan, ۲/۲۵۵. -۱

Nahhas, Abi Ja'far, Ma'ani al-Qur'an, ed. Muhammad 'Ali Sabuni, ۶ vols. ۱st edition, Umm al-Qura University, Saudi Arabia, ۱۴۰۸/۱۹۸۸ , ۱/۲۱۴; Ibn Hajar 'Asqalani, Fath al-Bari, ۹/۴۱۶; Ibn Jawzi, 'Abd al-Rahman, Zad al-Masir', ۱/۲۴۰; for more information about other views brought up in this regard, see: ۱. indicative statement: Shubbar, Sayyid 'Abd Allah, Al-Jawhar al-Thamin, ۱/۲۳۵; Qurtubi Ansari, Abu 'Abd Allah Muhammad b. Ahmad, Tafsir-i Qurtubi (Al-Jami' li-Ahkam al-Qur'an), ۲۰ vols. Dar Ihya' al-Turath al-'Arabi, Beirut, ۱۴۰۵/۱۹۸۵., ۳/۱۶۱; ۲. preference of breastfeeding: Musawi Sabzwari, 'Abd al-'Ali, Mawahib al-Rahman, ۴/۵۸; Sabziwari, Muhammad Al-Jadid, ۱/۲۸۶; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ۲/۲۹; Tabrisi, Fadhl b. Hasan 'Majma' al-Bayan , ۱/۳۳۳; Ha'iri Tehrani, Mir Sayyid 'Ali, Muqtaniyat al-Durar wa Multaqatat al-Thamar, ۱۲ vols. Dar al-Kutub al-Islamiyya, Tehran, ۱۳۷۸/۱۹۵۹. ۲/۷۶; Jassas, Ahkam al-Qur'an, ۱/۴۸۸; Tabari, Muhammad b. Jarir, 'Jami' al-Bayan ', ۲/۶۶۴; Maghniyya, Muhammad Jawad Al-Kashif, ۱/۳۶۵; 'Amili, Sayyid Muhammad, Nihayat al-MaramShara'i' al-Islam, ۱/۴۶۰; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, ۵/۴۵۶; ۳. mother's priority in breastfeeding: Jassas, Ahkam al-Qur'an, ۱/۴۹۰; Muqaddas Ardabili, Zubdat al-Bayan, p. ۵۵۶-۵۵۷; Fadhil Hindi, Muhammad b. Hasan Kashf al-Litham, ۲/۱۰۵. -۲

Faydh Kashani, Mulla (Mawla) Muhsin, Al-Safi fi Tafsir Kalam Allah, Dar al-Murtadha li al-Nashr, n. d., ۱/۲۳۹; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-AfhamShara'i' al-Islam, ۸/۴۱۲; Bahrani, Yusuf, Al-Hada'iq al-Nadhira', ۱۹/۴۲۴. -۳

months).(۱) On the other hand, the longest time for a baby to be breastfed and deemed as helpful is two years, after which the baby's breastfeeding is no longer of any benefit to the baby.(۲)

Accordingly, it is obvious that a ruling as to the necessity of breastfeeding a baby up to two full years is not exclusive to the premature babies (born at ۲۶ weeks) or whose parents are in dispute(۳); rather, it includes all children and it means that twenty four months is the maximum acceptable time for breastfeeding, without the pregnancy period having any impact on this ruling.(۴)

Second: although, according to the statement (that for such as desire to complete the breastfeeding) , the completion of breastfeeding period is conditional on someone's demanding the full breastfeeding period, but this one is not intended to be the mother herself; rather, this one is intended to be the father. Therefore, if the father provides for the required expenses of breastfeeding the baby up to two years, the mother is obliged to complete the breastfeeding period.(۵)

Conclusion: Comparing the content of the verse (Mothers shall breastfeed their children for two full years, that for such as desire to complete the breastfeeding)with the content of the verse (His mother carried him through weakness upon weakness, and his weaning takes two years.)(۶) and (and his gestation and weaning take thirty months),(۷) we conclude that the breastfeeding period varies between twenty one to twenty four months. Since the total length of pregnancy and

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۱- Tabari, Muhammad b. Jarir, 'Jami' al-Bayan', ۲/۶۶۵; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Tibyan, ۲/۲۵۵; Muqaddas Ardabili, Zubdat al-Bayan, p. ۵۵۷.

۲- Raghib Isfahani, Al-Mufradat, p. ۴۴۱; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ۲/۲۹.

۳- Tabari, Muhammad b. Jarir, 'Jami' al-Bayan', ۲/۶۶۶; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ۲/۲۹; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik AfhamShara'i' al-Islam, ۸/۴۱۷; Tusi, Abu Ja'far Muhammad b. Hasan Al-Tibyan, ۲/۲۵۶; Tabrisi, Fadhl b. Hasan, 'Majma' al-Bayan, ۱/۳۳۳; Tabari, Muhammad b. Jarir, 'Jami' al-Bayan', ۲/۶۶۵; also for more information on other possibilities see: ۱. a measure for being mahram (one who is within a prohibited degree of marriage) as a result of breastfeeding: Ibn Qudama, 'Abd Allah b. Ahmad, Al-Mughni, ۱۲ vols. Dar al-Kutub al-'Arabiyya, Beirut,

n.d., ۹/۲۰۲; ۲. a measure for the necessity of provision of maintenance by the father: .Jassas, Ahkam al-Qur'an, ۱/۴۸۸, ۱/۴۹۶

Tabari, Muhammad b. Jarir, 'Jami' al-Bayan', ۲/۶۷۲; Ibn Hajar 'Asqalani, Fath al- -۴ .Bari, ۹/۴۱۶

Sabziwari, Muhammad, Al-Jadid, ۱/۲۸۶; San'ani, Al-Musannaf, ۷/۵۷, No. ۱۲۱۷۳; - ۵ Shawkani, Muhammad b. 'Ali, Fath al-Qadir al-Jami' bayn Fanni al-Riwaya wa al-Diraya min 'Ilm al-Tafsir, ۵ vols. 'Alam al-Kutub, Beyrut, n.d., ۱/۲۴۵; Qurtubi, Al-Jami' li-Ahkam al-Qur'an, ۳/۱۶۱; Najafi, Muhammad Hasan, Jawahir Shara'i' al-Islam, ۳۱/۲۷۳; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, ۲/۱۶۰; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, ed. Sayyid 'Ali al-Khurasani, ۶ vols. ۱st edition, Nashr-i Islami Publication .Qum, ۱۴۰۷/۱۹۸۷.۰۷, ۵/۱۳۰

.Q. ۳۱: ۱۴ -۶

.Q. ۴۶: ۱۵ -۷

breastfeeding is thirty months and the pregnancy period varies between six to nine .months

Twenty one months is the least length of time for breastfeeding that the mother is obliged to complete; however, its completion to twenty months during the parents' separation is upon the mother only when the father demands it from the mother (of his baby) while paying for her expenses. Thus, the obligation for completion of (breastfeeding period is a conditional obligation rather than an absolute one.(۱

Obviously, legal obligation of completing the breastfeeding period in case of the father's demand is reconcilable with the non-permissibility of forcing the mother to breastfeeding, which is understood from Sulayman b. Dawud b. Minqari's tradition and other evidences(۲) and over which there is consensus by the Sunni and Shi'a jurists(۳); for, there is no correlation between the legal obligation of an action and the .coercion to perform it

On the other hand, although the mother is legally obliged to breastfeed her baby for twenty months, it is preferable for the mother to complete the breastfeeding period (up to twenty-four months to the benefit of the baby.(۴

Father's Duties during Breastfeeding period

Provision of the Mother's Expenses during Breastfeeding Period

After stating the divorced mothers' duties concerning the completion of breastfeeding .period, God proceeds to state their husbands' reciprocal duties

With the phrasing (and on the father shall be their maintenance and clothing, in accordance with honorable norms), the Holy Qur'an points out that the baby's father is legally obliged to provide his ex-wife's maintenance and clothing during the .breastfeeding period

In the above verse (Q. ۲: ۲۳۳), God has

۱- .Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۱۲

۲- Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/۴۰, No. ۴; Tusi, Abu Jaʿfar Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۱۰۷, No. ۳۶۲; Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۱۳۹, No, ۳۵۱۰; also for more information on other evidences expressed for non-permissibility of forcing the mother to breastfeed her baby and their criticisms, see: Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۱۶۰; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲ vols. Makyabat al-Radhawiyya li Ihya' al-Athar al-Jaʿfariyya, n.d., ۲/۶۲۷; Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, ۵/۱۳۰; ʿAmili, Sayyid Muhammad, Nihayat al-MaramShara'iʿ al-Islam, ۱/۴۶۱; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut fi fiqh al-Imamiyya, ed. Muhammad Tqi Kashfi, ۸vols, Al-Maktabat al-Murtadhawiyya, Tehran, ۱۳۸۷/۱۹۶۷, ۳/۲۳۹; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۴۷۱; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq fi Sharh al-Tabsira, ۲۶ vols. ۳rd edition, Mu'assisa-yi .Dar al-Kitab, Qum, ۱۴۱۲/۱۹۹۱, ۲۲/۲۹۶

۳- - See: Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۶۴۸; Muhaqqiq Hilli, Shara'iʿ al-Islam, ۲/۵۶۶; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۲۰۰; Qummi Sabziwari, Shaykh ʿAli, Jamiʿ al-Khilaf wa al-Wifaq bayn al-Imamiyya wa bayn al-Aʿimmat al-Hijaz wa al-ʿIraq, ed. Husayn Husayni Birjandi, ۱st edition, Zamina Sazan-i Ẓuhur-i Imam-i ʿAsr (A.S.), ۱۴۲۱/۲۰۰۱, p. ۵۱۰; ʿAllama Hilli, Qawaʿid al-Ahkamʿ, ۳/۱۰۱; idem,

Irshad al-Adhhan, ۲/۴۰; idem, Tahrir al-Ahkam, ۱/۲۴۸; Mihaji Asuyuti, Muhammad b. Ahmad, Jawahir al-ʿUqud wa Muin al-Qudhat wa al-Muqiʿin wa al-Shuhud, ۲ vols. ۱st edition, Dar al-Kutub al-ʿIlmiyya, Beirut, ۱۴۱۷/۱۹۹۶, ۲/۱۷۴; Ibn Hajar ʿAsqalani, Fath al-Bari, ۹/۴۱۷; Ibn Zuhra Hilli, Ghunyat al-Nuzuʿ ila ʿIlmiya al-Usul wa al-Furuʿ, ed. Ibrahim Bahaduri, ۱st edition Imam Sadiq Institute, Qum, ۱۴۱۷/۱۹۹۶, p. ۳۸۷; Ibn Fahd Hilli, Al-Muhadhdhab al-Bariʿ, ۳/۴۲۴; Kashani, Abu Bakr b. Masʿud, Badaʾiʿ al-Sanaʾiʿ fi Tartib al-Sharaʾiʿ, ۷ vols. ۱st edition, Al-Maktibat al-Habibiyya, Pakistan, ۱۴۰۹/۱۹۸۹, ۴/۴۰; Nawawi, Yahya b. Sharaf, Al-Majmuʿ fi Sharh al-Muhadhdhab, ۲۰ vols. Dar al-Fikr, nd., .۱۸/۳۱۲

Mufid, Muhammad b. Muhammad al-, ʿAl-Muqniʿa, Nashr Islami Publication, ۱۴۱۰, -۴ p.۵۳۱; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Nihaya, p. ۵۰۳; Ibn Barraj Trablusi, Qazi ʿAbd al-ʿAziz Al-Muhadhdhab, ۲/۲۶۱; Hilli, Jaʿfar b. Hasan, Al-Mukhtasar al-Nafiʿ, p. ۱۹۴; ʿAllama Hilli, Tahrir al-Ahkam, ۲/۴۳; idem, Tabsirat al-Mutiʿallimin fi Ahkam al-Din, ed. Sayyid Ahmad Husayni, ۱st edition, Faqih Publication, Tehran, ۱۴۱۰/۱۹۸۹, p. ۱۸۷; ʿAllama Hilli, Idhah al-Fawaʾid, ۳/۲۶۳; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik Sharaʾiʿ al-Islam, ۸/۴۱۶; also see: Tabrisi, Fadhl b. Hasan, ʿMajmaʿ al-Bayan, ۲/۱۱۳; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Tibyan, ۲/۲۵۵; Rawandi, Qutb al-Din, Fiqh al-Qur'an, ۲ vols. ۲nd edition, Ayatollah Marʿashi Library, Qum, ۱۴۰۵/۱۹۸۴, ۲/۱۲۰.

made use of the [Arabic] phrase al-mawludi lahu (i.e., the one for whom the baby has been born) instead of the word father in order to show that the payment of the expenses of breastfeeding during the period after separation is upon the father. Because the baby had been born for his sake and as, he had wished.(۱)

The Holy Qur'an assigns responsibility for the provision of two things to the father during the breastfeeding period: rizq (maintenance, sustenance) and kiswa (clothing).

Although the term rizq is translated as sufficient food(۲), and kiswa as clothing,(۳) it seems that rizq is not restricted to food alone but includes all the things that the mother requires during her breastfeeding period.(۴) Therefore, the father is obliged to provide the mother with all her requirements during the breastfeeding period after separation.(۵)

Provision of mother's needs during the breastfeeding period is referred to as wage in verse ۶ of Surat al-Talaq; thus, it may be concluded that what is meant by the breastfeeding wages for the mother is the provision of her requirements during breastfeeding period.(۶) Similarly, it can be claimed that the wage that the father pays to his ex-wife for breastfeeding has to be so much as it provides her food and clothing ((requirements).(۷

Of course, the change of the Qur'an tone from "maintenance [food] and clothing" to "wages" is perhaps because if the divorce comes through before childbirth, the woman's ʿidda period will be over once delivered and there will remain no relationship between the

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ʿAmili, ʿAli b, Husayn (b. Muhyi al-Din Abi al-Jamiʿ), Al-Wajiz fi Tafsir al-Qur'an al- -۱ Aziz, Dar al-Qur'an al-Karim, ۱۴۱۳, ۱/۱۹۱; Qummi Mashhadi, Kanz al-Daqa'iq, ۲/۳۵۲. For more information about the other possibilities in the meaning of mawludi lahu and their criticisms, see: ۱. genetic or juridical dependence of the baby on the father: Faydh Kashani, Al-Safi, ۱/۲۳۹; Sabziwari, Muhammad, Al-Jadid, ۱/۲۸۶; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham Shara'iʿ al-Islam, ۸/۴۱۴; Shawkani, Muhammad b. ʿAli b. Muhammad, Fath al-Qadir, ۱/۲۴۵; Montesquieu, The Spirit of Laws (Ruh al-Qawanin), trans. Ali Akbar Muhtadi, Amir Kabir Publication, ۱۳۹۰/۱۹۷۰, p. ۶۳۰; ۲. paying attention to emotional aspects: Shirazi, Sayyid Muhammad Husayn, Taqrib al-Quran ila al-Adhhan, al-Wafa' Publication, Beirut, ۱۴۰۰/۱۹۸۰, ۲/۸۶; ۳. paying attention to the social conventions: Tabataba'i, Muhammad Husayn, Al-Mizan, ۲/۲۵۱; .Musawi Sabzwari, ʿAbd al-ʿAli, Mawahib al-Rahman, ۴/۵۸

Qurtubi, Muhammad b. Ahmad, Al-Jamiʿ li-Ahkam al-Qur'an, ۲۰ vols. ۲nd edition, -۲ Mu'assisat al-Ta'rikh al-ʿArabi, ۱۴۰۵/۱۹۸۵, ۳/۱۶; Thaʿalibi, ʿAbd al-Rahman, Al-Jawahir al-Hisan fi Tafsir al-Qur'an, ed. ʿAbd al-Fattah Abu Sunna, ۱st edition, Dar Ihya' al- .Turath al-ʿArabi, Beirut, ۱۴۱۵/۱۹۹۴, ۱/۴۶۷

Farahidi, Khalil b. Ahmad, Al-ʿAyn, ed. Mahdi al-Makhzumi, ۸ vols. ۲nd edition, Dar -۳ al-Hujra, Qum, ۱۴۰۹/۱۹۸۹, ۱۵/۲۲۳; Turayhi, Fakhar al-Din, Majm-ʿal-Bahrayn, ۳/۱۶۴;

Zubaydi, Muhammad Murtaza, Taj al-ʿArus min Jawahir al-Qamus, ١٠ vols. Maktibat al-Ihya, Beirut, n.d. ١٠/٣١٥.

٤- Jawahiri, Ismaʿil b. Hammad, Al-Sihah (Taj al-Lugh wa Sihah al-ʿArabiyya), ed. Ahmad b. ʿAbd al-Ghafur ʿAttar, ۶ vols. ۴/١۴٨١; Ibn Manzur, Lisan al-ʿArab, ١۵ vols. ١st edition, Adab al-Howza, Qum, ١۴٠۵/١٩٨۵, ١٠/١١۵; Turayhi, Fakhar al-Din, Majmaʿ al-Bahrayn, ed. Sayyid Ahmad Husayni, ۴ vols. ٢nd edition, Maktab al-Nashr al-Thiqafat al-Islamitta, ١۴٠۵/١٩٨۵, ١/٨٧ ١٣١; ʿAskari, Abu al-Hilal, et al, Muʿjam al-Furuq al-Lughawiyya, ed. Al-Shaykh Baytullah Bayat, ١st edition, Mu'assisat al-Nashr al-Islamiyya, Qum, ١۴١٢/١٩٩١, p. ٢۵۴, No. ٩٩٩-١٠٠٠; also see: Fadhlullah, Muhammad Husayn, Min Wahy al-Qur'an, ٢۵ vols. ٣rd edition, Dar al-Zahra, ١۴٠۵/١٩٨۵, ۴/١٨۴.

۵- Tabrisi, Fadhl b. Hasan, Majmaʿ al-Bayan, ١/٣٣٣; Sabziwari, Muhammad, Al-Jadid, ١/٢٨۶; Shawkani, Muhammad b. ʿAli b. Muhammad, Fath al-Qadir, ١/٢۴۵; for more information about the other possibilities brought up about this part of the verse and their criticisms, see: ١. expenses of the wife, whether still married or divorced: Jassas, Ahkam al-Qur'an, ١/۴٨٩; Maghniyya, Muhammad Jawad, Al-Kashif, ١/٣۶۵; Tabrisi, Fadhl b. Hasan, Majmaʿ al-Bayan , ١/٣٣٣; Shirazi, Sayyid Muhammad Husayn, Taqrib al-Quran, ٢/٨۶; ٢. the baby's expenses: Qurtubi, Al-Jamiʿ li-Ahkam al-Qur'an, ٣/١۶٣; ʿAllama Hilli, Idhah al-Fawa'id, ٣/٢٨٢.

۶- It is perhaps for this reason that some interpreters have claimed that this part of the verse denotes the permissibility of hiring a foster suckling-mother in exchange for food and clothing; for more information, see: Jassas, Ahkam al-Qur'an, ١/۴٨٨.

٧- Qurashi, ʿAli Akbar, Ahsan al-Hadith, ١٢ vols. ١st edition, Bunyad Biʿthat, Tehran, ١۴٠٧/١٩٨٧. ١/۴٣۵.

man and the woman. However, if the divorce is after the childbirth, the matrimonial relation between the man and the women will remain unbroken – however weakened – until the ʿidda period is over. As we explained before, the woman cannot ask for wages for breastfeeding her baby while matrimonial relation is still valid; rather, it is incumbent upon the husband to provide his wife with food and clothing.

Now that the father is obliged to provide the mother's expenses during the breastfeeding period, the question arises that how much the amount of these

expenses will be. To answer this question, the Qur’an uses the phrase bi al-maʿruf (in accordance with honorable norms).

There are various probabilities as to what is meant by maʿruf, which can be divided into two general categories: ١. how to pay, ٢. and how much to pay.

According to the first probability, the father has to pay for his ex-wife's requirements in a decent way during the breastfeeding period. According to the second probability, however, the amount of the father's payment to his ex-wife during that period has to be honorable; in such a case, there are three probabilities: proportion to the mother's social status, proportion to the father's financial ability, sufficiency of the amount.(١)

It seems that the criterion for determining maʿruf is the financial power and potential of the baby's father and does not have anything to do with the mother's social status,(٢) since the Qur’an continues to emphasize that God does not task man except

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١- For more information, see: Muqaddas Ardabili, Zubdat al-Bayan , p. ۵۵٧; Khuzaʿi Nayshaburi, Husayn b. ʿAli b. Muhammad, Rawdh al-Jinan wa Rawh al-Janan fi Tafsir al-Qur'an, Islamic Research Foundation of Asan Quds Razavi, Mashhad, ١۴٠٨/١٩٨٧, ٣/٢٨۶; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ٢/٢٩; Balaghi, Sayyid ʿAbd al-Hamid, Hujjat al-Tafasir wa Balagh al-Iksir, ١٠ vols. ١st edition, Hikmat, Qum, ١٣٨۶/١٩۶۶, ١/١٨١; Taliqani, Sayyid Mahmud, Partuwi az Qur'an, ٢/١۵۶; Qurtubi, Al-Jamiʿ li-Ahkam al-Qur’an, ٣/١۶٣, and ١٨/١٧٠-١٧١; Ibn Kathir Qurashi, Ismaʿil, Tafsir al-Qur'an al-ʿAzim, ۴ vols. Dar al-Maʿrifa, Beirut. ١۴١٢/١٩٩٢, ١/٢٩١; Jassas, Ahkam al-Qur'an, ١/۴٨٩; Ibn Jawzi, ʿAbd al-Rahman, Zad al-Masir, ١/٢۴١; Thaʿalibi, ʿAbd al-Rahman, Al-Jawahir al-Hisan, ١/۴۶٨; Tabari, Muhammad b. Jarir, Jamiʿ al-Bayan, ٢/۶٧٢; Nahhas, Abi Jaʿfar, Maʿani al-Qur'an, ed. Muhammad ʿAli Sabuni, ۶ vols. ١st edition, Umm al-Qura University, Saudi Arabia, ١۴٠٨/١٩٨٨, ١/٢١٧.

٢- See: Tabrisi, Fadhl b. Hasan, ʿMajmaʿ al-Bayan, ١/٣٣٣; Sabziwari, Muhammad, Al-Jadid, ٢/٢٨۶; Ibn Jawzi, ʿAbd al-Rahman, Zad al-Masir, ٨/۴۵; Tabari, Muhammad b. Jarir, Jamiʿ al-Bayan, ٢٨/١٩٠-١٩١, No. ٢۶۶٢۵-٢۶۶٢٨; Jassas, Ahkam al-Qur'an, ٣/۶١٩;

.Qurtubi, Al-Jami' li-Ahkam al-Qur'an, ٨/١٧٢

according to his capacity, (No soul is to be tasked except according to its capacity)(١). The best witness to the truth of the above is what God has said in Surat al-Talaq :concerning ma'ruf

Then, if they breastfeed [the baby] for you, give them their wages and consult(together honorably... Let the affluent man spend out of his affluence, and let he whose provision has been tightened spend out of what Allah has given him. Allah does not task any soul except [according to] what He has given it. Allah will bring about ease .(after hardship.) (۶۵: ۶-٧

Breastfeeding Wage

As mentioned before, God has brought up in Surat al-Talaq the issue of giving wages to breastfeeding mothers, (Then, if they suckle [the baby] for you, give them their .)wages

Therefore, it is noteworthy that the Qur'an talks about giving wages to mothers for breastfeeding when all matrimonial bonds are broken and there would be no difference between her and other women. However, while the woman is still in her 'idda period and there are some signs of matrimony remained, the Qur'an does not say anything about wages, but suffices to mention the provision of food and clothing, which we refer to in legal convention as nafaqa (maintenance or alimony). This was of course what the man as a husband, had to provide for even if no divorce were to (come through.(٢

Perhaps it can be understood from this difference in phrasing that the institution of marriage is too sacred to use such terms

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.Q. ٢: ٢٣٣ -١

Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۶/٣٠; Makki, Muhammad b. - ٢ .Mansur, Al-Sara'ir, ٢/۶۴٩; Muhaqqiq Hilli, Shara'i' al-Islam, ٢/۵۶۶

as wages, which in itself denotes a kind of wage earning and a master-servant relationship, in regulating the financial relationship between the man and the woman.

In any case, one of the issues discussed in Islamic law is establishment of a leasehold relationship between the wife and the husband concerning breastfeeding their baby.

Some Sunni jurists such as Shafiʻi and Ahmad b. Hanbal, as well as Shaykh Tusi from among the Shiʻa jurists believe that no wage contract is made between the wife and the husband in relation to breastfeeding. Moreover, the wife cannot demand wages for breastfeeding her baby. That is because the husband is the beneficiary of his matrimonial relation to his wife and there is no reason for receiving wages. The permissibility of a leasehold relationship between a woman and someone other than her husband concerning breastfeeding (i.e., as a wet nurse) is no reason for the existence of this relationship between she and her husband; and finally, receiving wages is against the requirements of marriage contract.(١)

In contrast, most of the Shiʻa jurists believe that a contract for breastfeeding is made between the wife and the husband and the former can demand wages for breastfeeding her baby. In order to prove it, they provided evidence from the verses of the Qur'an, the correlation between the permissibility of contract with one's wife and the permissibility of contract with other people, and the husband's being undeserved of all his wife's benefits.(٢)

To our opinion, none of the previous reasons denies or proves

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١- ʻAllama Hilli, Tadhkirat al-Fuqaha, ٢/٢٩٨; Tusi, Abu Jaʻfar Muhammad b. Hasan, Al-Mabsut, ۵/٢٣٩; Nawawi Yahya b. Sharaf, Rawdhat al-Talibin, ed. ʻAdil Ahmad ʻAbd al-Mawjud, ٨ vols. Dar al-Kutub al-ʻIlmiyya, n.d., p.٨٨٢; Ibn Qudama, Al-Mughni, ۶/٨۵; ʻAllama Hilli, Mukhtalaf al-Shiʻa, ٩ vols. ١st edition, Nashr-i Islami Publication, Qum, ١۴١٢/١٩٩٢, ٧/٣٠۵; Makki, Muhammad b. Mansur, Al-Sara'ir, ٢/۶۴٩; Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Masalik al-Afham, ٨/۴١٣; ʻAllama Hilli, Tahrir al-Ahkam, ١/٢۴٧ and ٢/۴٣; Ibn Barraj Trablusi, Qazi ʻAbd al-ʻAziz Al-Muhadhdhab, ٢/٢۶٢.

ʽAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۹۸; idem, Tahrir al-Ahkam, ۱/۲۴۷; Makki, - ۲ Muhammad b. Mansur, Al-Sara'ir, ۲/۴۷۲; Tusi, Abu Jaʽfar Muhammad b. Hasan, Al-Khilaf, ۳/۴۸۵; idem, Al-Mabsut, ۵/۲۳۸; ʽAllama Hilli, Mukhtalaf al-Shiʽa, ۶/۱۶۰-۱۶۱ and ۷/۳۰۴; idem, Idhah al-Fawa'id, ۳/۲۶۲; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۷/۵۴۶; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, ۸/۴۱۳; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۳; Bahrani, Yusuf, Al-Hada'iq al-Nadhiraʽ, ۱۲/۶۰۵.

the permissibility of establishing a leasehold relationship between the wife and the husband; therefore, lacking the verbal signification, we have to turn to practical principles.

If we doubt about the permissibility of hiring the mother for breastfeeding her own baby, the principle of lawfulness denotes the permissibility of such a deal, since on one hand, the father pays the wages, and on the other hand, the mother breastfeed her own baby(۱); just as the principle of soundness of transactions denotes the soundness and the necessity for each party to observe the content of such a transaction.

Moreover, if we doubt that, in case of the mother's one-sided request for wages, whether the father is obliged to pay for it or not, the principle of non-necessity and his exemption from obligation suggests that the father is not committed to pay wages.

Thus, two issues should not be confused with each other; one is the parents' consent for paying and receiving wages while marriage bond is still established between them; the other is the father's obligation to pay wages when the mother makes breastfeeding her baby conditional on receiving wages.

Reconciliation between these two principles prompts us to say that if the father agrees on such a contract, the deal is sound and the two parties are obliged to fulfill their commitments, but the father cannot be forced to pay wages.

Obviously, if the mother receives wages from her husband for breastfeeding her own baby, she is not permitted to feed the baby with supplementary food or

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ʿAllama Hilli, Mukhtalaf al-Shiʿa, ۶/۱۶۰ (in principle we regard it as permissible); - ۱ Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۱۶۰; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, .Masalik al-Afham, ۸/۴۱۳; Bahrani, Yusuf, Al-Hada'iq al-Nadhiraʿ, ۲۵/۷۴

animal milk instead of giving it milk from her own breasts(۱). Since she is not permitted to have the baby wet nursed by another woman (i.e., a foster suckling-mother), (unless the father permits her to do so.(۲

As it was said, according to the Qur'anic statement (Then, if they breastfeed [the baby] for you, give them their wages), the father of the baby is committed to pay the mother's wage during their separation period, and if the father dies, the expense is to be paid for from the baby's share of inheritance.(۳) Moreover, the possibility that the provision of expenses for the breastfeeding would lie with the baby (even if the father .were alive) and is paid from the baby's assets(۴), is incorrect

In addition, the father is obliged to pay for the mother's wage once she undertakes to breastfeed the baby,(۵) and there is no need for the breastfeeding period to end – as .al-Jassas claims(۶) – so that the mother may receive her wage

Determining the amount of the mother's wage is a matter of agreement, too, which depends on the mutual consent. Restricting it to the wage that the other women receive for this task in equal conditions (ujrat al-mithl – fair equivalent wage)(۷) is incorrect, because the amount of breastfeeding wage is subject to the father's .financial capability

In order to prove this issue, besides the verse (but if you make things difficult for each other, then another woman will breastfeed [the baby] for him),(۸) which regards the father's

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.ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۹۹ -۱

۲- For more information about the views on issue, see: ۱. permit for wet-nursing: ʿAllama Hilli, Idhah al-Fawa'id, ۳/۲۶۲; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. ۱۷۶; ʿAllama Hilli, Qawaʿid al-Ahkamʿ, ۳/۱۰۱; idem, Tahrir al-Ahkam, ۲/۴۳; ۲. concerning the quality of contract between the father and the mother: Ibn Barraj Trablusi, Qazi ʿAbd al-ʿAziz Al-Muhadhdhab, ۱/۴۸۱; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۲; Bahrani, Yusuf, Al-Hada'iq al-Nadhiraʿ, ۲۵/۷۴; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۱۵.

۳- Ibn Barraj Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, ۲/۲۶۲; Hilli, Jaʿfar b. Hasan, Al-Mukhtasar al-Nafiʿ, p. ۱۹۴; ʿJamiʿ al-Khilaf wa al-Wifaq, p. ۵۱۰; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Nihaya, p. ۵۰۳; Ibn Zuhra Hilli, Ghunyat al-Nuzuʿ ila ʿIlmiya al-Usul wa al-Furuʿ, ed. Ibrahim Bahaduri, ۱st edition, Imam Sadiq Institute, Qum, ۱۴۱۷/۱۹۹۶. p. ۳۸۷; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, ۲۲/۲۹۳; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۹/۲۴۴, No. ۹۴۶-۹۴۷.

۴- Al-Sara'ir, ۲/۴۷۱; Shara'iʿ al-Islam, ۸/۴۱۹; ʿAllama Hilli, Qawaʿid al-Ahkam, ۳/۱۰۱; ʿAllama Hilli, Irshad al-Adhhan, ۲/۴۰; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۷۴; Al-Hada'iq al-Nadhira, ۲۵/۷۴-۷۵.

۵- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۱۹; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Khilaf, ۳/۴۸۹; Ibn Zuhra Hilli, Ghunyat al-Nuzuʿ, p. ۲۸۶.

۶- Jassas, Ahkam al-Qur'an, ۳/۶۱۹.

۷- Al-Basa'ir, ۴۷/۲۷۵; ʿAmili, ʿAli b, Husayn (b. Muhyi al-Din Abi al-Jamiʿ), Al-Wajiz fi Tafsir al-Qur'an al-ʿAziz, ۱st edition, Dar al-Qur'an al-KArim, Qum, ۱۴۱۳/۱۹۹۳, ۲/۱۱۶; Al-Majmuʿ fi Sharh al-Muhadhdhab, ۱۸/۳۱۳.

۸- Q. ۶۵:۶.

being in dire straits as the criterion for permitting the baby to be left with the foster suckling-mother. We can rely on the content of traditions related by Dawud b. Husayn, Kanani, Abi al-ʿAbbas, and Halabi(۱), for the wage which the mother is demanding is less than, more than, or equal to the fair equivalent wage.(۲)

In these traditions, two issues are emphasized explicitly or implicitly: permissibility of taking the baby from the mother in case of asking for higher wage and the mother's priority in breastfeeding her baby if she does not ask for higher wage.(۳) Therefore,

taking the baby from the mother and leaving it with a foster suckling-mother when the former asks for a higher wage is permissible, whether the amount she is demanding is equal to the fair equivalent wage, lower, or higher than that. On the other hand, the mother is given priority over other women for breastfeeding her baby (in case she receives equal wage and does not demand a higher wage than they do.(۴)

Reciprocal Duties of Parents during the Breastfeeding Period

Through the statement (neither the mother shall be made to suffer harm on her child's account, nor the father on account of his child) the Qur’an specifies that the mother should complete the breastfeeding period upon the father's demand and the father, in return, should undertake her living expenses during this period. The parents' separation should not be a means to harming each other or their child.

This part of the verse is divided into two independent parts, i.e.

۱- Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/۴۵, No. ۴, ۲ and ۶/۱۰۳, No. ۳.

۲ - ʿAmili, Sayyid Muhammad, Nihayat al-Maram fi Sharh-i Mukhtasar Shara’iʿ al-Islam, ۱/۴۶۴; Sabziwari, Muhammad Baqir b. Mu’min, Kifayat al-Ahkam, p. ۱۹۳; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۵.

۳- ʿAl-Muqniʿa, p. ۵۳۰; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Nihaya, p. ۵۰۳; Ibn Barraj Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, ۲/۲۶۲; Makki, Muhammad b. Mansur, Al-Sara’ir, ۲/۶۵۰; Najafi, Muhammad Hasan, Jawahir, ۱۳/۲۸۱; Ahkam al-Nisa, p. ۵۰; Halabi, Abu al-Salah, Al-Kafi fi al-Fiqh, ed. Ridha Ustadi, Maktaba Amir al-Mu’minin, Isfahan, ۱۴۰۳/۱۹۸۳, , p. ۳۱۶; Hilli, Jaʿfar b. Hasan, Al-Mukhtasar al-Nafiʿ, p. ۱۹۴. Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۲۰۰.

۴ - ʿShahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. ۱۷۶; ʿAllama Hilli, Qawaʿid al-Ahkamʿ, ۳/۱۰۱; ʿAllama Hilli, Irshad al-Adhhan, ۲/۴۰; ʿJamiʿ al-Khilaf wa al-Wifaq, p. ۵۱۰; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۵; Muhaqqiq Hilli, Shara’iʿ al-Islam, ۲/۵۶۶; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Khilaf, ۵/۱۳۰.

la tudharra walidatun bi waladiha (neither the mother shall be made to suffer harm on her child's account), and la tudharra mawludun lahu bi waladihi (nor the father shall be made to suffer harm because of his child). The verb tudharr is read in two ways: la tudharru in the active form and la tudharra in the passive form, due to which in the former case the two words walidatun and mawludun lahu are subjects (faʿil) and in the latter case they are the subject of the passive (na'ib faʿil), therefore, two :possibilities are perceived in its meaning

First, children may suffer because of their parents. Accordingly, God undertakes to prevent the parents from harming their children, saying: the mother must not harm (her child and the father must not do, either.(١

Mother's harming her own child is imaginable in several ways, such as refraining from breastfeeding the child, which can be due to fury against the father and negligence in (taking care of the child's needs such as cleaning, feeding, and clothing.(٢

Father's harming his child can be done in various forms, such as negligence or delay in paying the child's living expenses, unduly separating the child from the mother and (leaving it with another person.(٣

Second, the parents may suffer on each other's account. Experience has shown that in many cases that dispute and conflict arises between the wife and the husband, ;each one of them tries to harm the other by taking the child as a means to this end

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١ - Tabari, Muhammad b. Jarir, Jamiʿ al-Bayan, ٢/۶٧٧, No. ٣٩٣٨; Tusi, Abu Jaʿfar .Muhammad b. Hasan, Al-Tibyan, ٢/٢۵٧

٢- Bayhaqi, Ahmad b. Husayn, Sunan, ٧/۴٧٨; Sanʿani, Al-Musannaf, ٧/۵٩, No. ١٢١٧٨; Ha'iri Tehrani, Muqtaniyat al-Durar, ٢/٧۶; ʿAmili, ʿAli b, Husayn, Al-Wajiz fi Tafsir al-Qur'an .al-ʿAziz, ١/١٩١

٣- Sabziwari, Muhammad, Al-Jadid, ١/٢٨۶; Tabrisi, Fadhl b. Hasan, ʿMajmaʿ al-Bayan, .١/٣٣٣; Shirazi, Sayyid Muhammad Husayn, Taqrib al-Quran, ٢/٨۶

.in the meantime, the only one who suffers most is the child

If we accept this possibility in the meaning of the Qur'anic verse, it shows that the Qur'an is trying to state that the parents should not try to harm each other by using (their child as bait.(۱

Father's harming the mother may be through such acts as emotional instigation of the mother by making her breastfeed their baby without paying for her living expenses, depriving her of seeing and taking care of her baby, taking the baby away from her in order to revenge her and leaving it with someone else for breastfeeding, as well as preventing her from breastfeeding the baby while she is indeed able to breastfeed the baby herself. Obviously, in the above cases, the first one to be harmed is the (baby.(۲

On the other hand, since the mother is not able to persecute the father directly, she tries to achieve her goal by using the baby as bait throughout one of the following ways. Through emotional provocation of the father making him to pay more for her breastfeeding the baby; preventing the father from seeing his baby; avoiding to (breastfeed the baby and abandoning the baby to its father.(۳

Although some believe that the verse (neither the mother shall be made to suffer harm on her child's account, nor the father on account of his child) encompasses both possibilities(۴), the statement can prohibit harming the baby or the wife in itself and out of the context of

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۱ - Tamimi, Nu'man b. Muhammad, Da'a'im al-Islam, ۲/۲۵۶, No. ۹۷۵; Maghniyya, Muhammad Jawad, Al-Kashif, ۱/۳۶۵; Tabari, Muhammad b. Jarir, 'Jami' al-Bayan', .۲/۶۷۴-۶۷۵, No. ۳۹۳۲-۳۹۳۷

۲ - Shirazi, Sayyid Muhammad Husayn, Taqrib al-Quran, ۲/۸۶; Tabataba'i, Muhammad Husayn Al-Mizan, ۲/۲۵۱; Qurtubi, Al-Jami' li-Ahkam al-Qur'an, ۳/۱۶۷; Bayhaqi, Ahmad b. .Husayn, Sunan, ۷/۴۷۸

.Tabari, Muhammad b. Jarir, 'Jami' al-Bayan', ۲/۶۵۷, No. ۳۳ -۳

Tabrisi, Fadhl b. Hasan, Majma' al-Bayan, ۱/۳۳۳; Tusi, Abu Ja'far Muhammad b. -۴ .Hasan, Al-Tibyan, ۲/۲۵۵

the verse as a general law whether the verb is in the active or passive form – as according to some traditions, shunning from intercourse by the wife or the husband (during pregnancy is an evidence of mutual harming of both husband and the wife.(۱

To our opinion, this phrase, given the sentences before and after this statement, suggests the prohibition of the wife and the husband from harming one another after separation and during the breastfeeding period. The duties of the wife and the husband in this period should not turn into means for taking revenge from each other, the revenge that due to the breaking of marital relation would occur just through their (mediating link, namely their child.(۲

Therefore, the verb la tudharru is used in the passive form and concerns the prohibition of the ex-couple harming each other via their child rather than the parents .directly damaging their child; although, in its own place, the latter can be true

Duties of the Father's Successors during the Breastfeeding Period

With the clarification of the duties of both the parents toward their child during the period after separation and also their reciprocal duties toward each other, the question remains to be answered that if the father dies during the breastfeeding .period, who would take on his duty to pay for the mother's wage

Stating (and on the [father's] heir devolves [duties and rights] similar to that), the Qur'an intends to say that the father's duties during the baby's breastfeeding period .are transferred over to his heir

For what is meant

Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۶/۴۱, No. ۶; also, see: Muqaddas Ardabili, -۱

.Zubdat al-Bayan, p. ۵۵۸

.Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۵۰۹, No, ۴۷۸۸ -۲

by heir (warith) different possibilities have been considered: the father's heir, the child's father, either of the mother or the father when the other is dead, the heir to each of the father or the mother, the child's future heirs, the child itself, the child's (executor (wasi).(۱

Despite what some sources have claimed(۲), there are different possibilities as to what is meant by mithl-i dhalik (similar to that): payment of the mother's maintenance or alimony (nafaqa), not inflicting any harm, provision of the mother's expenses, and (having the child wet nursed.(۳

To our opinion, what "heir" means in this statement is the heir to the father and as this statement refers to the two statements before it, it contains two issues of providing the mother's maintenance (daily sustenance and clothing) and not inflicting any harm .on her

Therefore, the father's heirs are obliged not to inflict any harm on the mother by means of her child, just as they have to provide for her food and clothes in a decent .way

It is clear, of course, that the holy verse proposes the transfer of the father's duties to his heirs, but it is silent about the source of provision and payment of the mother's maintenance.(۴) Thus, the father's heirs do not need to provide for the baby's expenses during the breastfeeding period from their own property; rather, either they provide the related expenses from the father's properties (shared among the heirs) – should we say these expenses are regarded as among his debts

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Faydh Kashani, Al-Safi, ۱/۲۳۹; Muqaddas Ardabili, Zubdat al-Bayan, p. ۵۵۷ and ۵۵۹; -۱ Nahhas, Maʿani al-Qur'an, ۱/۲۱۹-۲۲۰; Shaybani, Muhammad b. Hasan, Nahj al-Bayan ʿan Kashf-i Maʿani al-Qur'an, ۱st edition, Da'irat al-Maʿarif al-Islamiyya Publication,

Tehran, ۱۴۱۳/۱۹۹۳, ۱/۳۰۶; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ۲/۲۹; ۲/۲۹; ʿAmili, ʿAli b, Husayn, Al-Wajiz fi Tafsir al-Qur'an al-ʿAziz, ۱/۱۹۱; Musawi Sabzwari, ʿAbd al-ʿAli, Mawahib al-Rahman, ۲/۲۵۵-۲۵۸; Sanʿani, Al-Musannaf, ۷/۵۹-۶۰, No. ۱۲۱۷۸-۱۲۱۸۴.

۲- Ibn Jawzi, ʿAbd al-Rahman, Nawasikh al-Qur'an, Dar al-Kutub al-ʿIlmiyya, Beirut, n.d., p. ۹۰; Ibn al-ʿArabi, Muhammad b. ʿAbd Allah, Ahkam al-Qur'an, Dar al-Maʿrifa, Beirut, n.d., ۱/۲۰۵.

۳- Kufi, Ibn Abi Shayba, Al-Musannaf, ed. Saʿid Muhammad al-Liham, ۸ vols. ۱st edition, Dar al-Fikr, Qum, ۱۴۰۹/۱۹۸۸, ۴/۱۶۶, No. ۱-۴ and No. ۱۶۵ and ۱۶۷, No. ۱۰; Tabari, Muhammad b. Jarir, ʿJamiʿ al-Bayanʿ, ۲/۶۸۱, No. ۳۹۵۶-۳۹۵۸ and ۶۸۴; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Tibyan, ۲/۲۵۵; Nahhas, Maʿani al-Qur'an, ۱/۲۱۸ and ۲۱۶; Qummi Mashhadi, Kanz al-Daqa'iq, ۲/۳۵۲; Bayhaqi, Ahmad b. Husayn, Sunan, ۷/۴۷۸; Ibn Hajar ʿAsqalani, Fath al-Bari, ۹/۴۲۴; Thaʿalibi, ʿAbd al-Rahman, Al-Jawahir al-Hisan, ۱/۴۷۰; Shubbar, Sayyid ʿAbd Allah, Al-Jawhar al-Thamin, ۱/۲۳۵; Qummi, ʿAli b. Ibrahim, Tafsir al-Qummi, ed. Sayyid Tayyib Musawi Jaza'iri, ۲ vol. ۳rd edition, Dar al-Kutub li al-Ttibʿa wa al-Nashr, Qum, ۱۴۰۴/۱۹۸۴. ۱/۷۶; Jassas, Ahkam al-Qur'an, ۱/۴۹۲; Ibn Jawzi, ʿAbd al-Rahman, Zad al-Masirʿ, ۱/۲۴۲; Tabrisi, Fadhl b. Hasan, ʿMajmaʿ al-Bayan, ۱/۳۳۳; Tamimi, Nuʿman b. Muhammad, Daʿa'im al-Islam, ۲/۲۵۶, No. ۹۷۵; Qurtubi, Al-Jamiʿ li-Ahkam al-Qur'an, ۳/۱۷۰; Shawkani, Muhammad b. ʿAli b. Muhammad, Fath al-Qadir, ۱/۲۴۶.

۴- Fadhlullah, Muhammad Husayn, Min Wahy al-Qur'an, ۲۵ vols. ۳rd edition, Dar al-Zahra, ۱۴۰۵/۱۹۸۵.

– or from the baby's possessions.(۱)

Such a meaning of the statement (and on the [father's] heir devolve [duties and rights] similar to that) can also be understood from the traditions related from the Infallible Household of the Prophet (S.A.W.). Since some of these traditions have referred to the issue of alimony(۲), to the effect that as the father undertakes the responsibility of providing for the mother's maintenance during the breastfeeding period, after his death, this responsibility will be transferred to his heir.

However, not to the effect that the father's heirs provide for the mother's maintenance during the breastfeeding period from their own property like what is

true regarding the father's executor in relation to the minor children of the demised father.(۳) Moreover, it is for the same reason that it is asserted in the tradition related by Muhammad b. Abi ʿUmayr and Ibn Abi Yaʿfur that this maintenance is paid from (the baby's own share of inheritance.(۴

In some traditions the father and the heir in the statement (and on the [father's] heir devolve [duties and rights] similar to that)are taken to be the same with respect to the statement before that, i.e., (neither the mother shall be made to suffer harm on).(her child's account, nor the father on account of his child (۵

Careful examination of this group of traditions would clearly reveal that what is intended by the Words of Allah is preventing the father's heirs from persecuting the mother and her child. These persecutions

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Kufi, Al-Musannaf, ۴/۱۶۵, No. ۴ and ۱۶۶, No. ۷; Sanʿani, Al-Musannaf, ۷/۶۰, No. ۱۲۱۸۶; -۱ Shirazi, Sayyid Muhammad Husayn, Taqrib al-Quran, ۲/۸۶; Janabadhi, Sultan Muhammad, Bayan al-Saʿada fi Maqamat al-ʿIbada, ۴ vols, Tehran University, .Tehran, ۱۳۸۵/۱۹۶۵

ʿAyyashi, Muhammad b. Masʿud, Tafsir al-ʿAyyashi, ed. Hashim Rasuli Mahallati, ۲ -۲ vols. ʿIlmiyya Islamiyya Publication, Tehran, n.d., ۱/۱۲, No. ۳۸۳; Tamimi, Nuʿman b. .Muhammad, Daʿa'im al-Islam, ۲/۲۹۰, No. ۱۱۰۹

Karrami, Muhammad, Al-Tafsir li Kitab Allah al-Munir, ۷ vols. Matbaʿa ʿIlmiyya, -۳ .Qum, ۱۴۰۲/۱۹۸۲

.Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۹/۲۴۴, No. ۹۴۶-۹۴۷ -۴

Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/۴۱, No. ۶ and ۱۰۳, No. ۳; Ibn Babuwayh -۵ Qummi, Man la Yahdhuruhu al-Faqih, ۳/۵۱۰, No.۴۷۸۸; Tamimi, Nuʿman b. Muhammad, Daʿa'im al-Islam, ۲/۲۹۰, No. ۱۱۰۹; Ayyashi, Muhammad b. Masʿud, Tafsir al-ʿAyyashi, .۱/۱۲۰, No. ۳۸۴

may occur in various forms in their mental and financial affairs such as taking away the child from her mother, failure to give the child's share of inheritance in due time,

etc. The mother's separation from the child's father before his death lays the ground for numerous challenges between the father's family and heirs, i.e., grandfather, grandmother, brothers, and sisters on one side and his ex-wife (the child's mother) on .the other

The great Qur'an interpreter, 'Ali b. Ibrahim Qummi, comments on the statement (and on the [father's] heir devolve [duties and rights] similar to that): that "it means if a man dies and leaves behind a suckling baby, it is not befitting the heirs to cut down the (baby's maintenance cost; rather, it is best to increase it generously."(١

How to Wean the Baby

So far we explained that the mother is obliged to breastfeed her baby up to twenty one months; and in case she has separated from her husband, if her ex-husband wants her to complete the breastfeeding period, she is obliged to do so. Anyhow, the father is obliged, in return and as per his capacity, to provide for her maintenance during this period, and if he dies, his heirs are responsible to provide for the mother's .living expenses during this period

Now, the question remains to be answered that if the baby is to be weaned, who .should make the decision in this respect

:The Holy Qur'an replies the above question as follows

And if the couple desire to wean, with mutual consent and(

Qummi, 'Ali b. Ibrahim, Tafsir al-Qummi, ۱/۷۶; also see: Jassas, Ahkam al-Qur'an, -١ .١/۴۹۲

.(consultation, there will be no sin upon them.) (۲:۲۳۳

There are two possibilities as to which two people's desire matters: that of the father and mother(١) or the heir and the mother(٢); what is meant by fisal (which means both

separating and weaning)(۳) in the above verse, is either separating the baby from its paternal next of kin, or simply weaning.(۴)

Weaning the baby could mean that the baby starts eating food and is not being fed with milk or simply weaned from mother's milk, although it may be left with a foster suckling-mother to be breastfed.(۵)

The term fisal in the above verse seems to mean fitam, and what is meant by fitam, as it is related in traditions, is weaning the baby from the mother's milk before the ending of two years (i.e., twenty-four months).(۶) Since after two years there remains no obligation on anyone for breastfeeding to talk about separation(۷), for this reason claiming that the issue in question either is weaning the baby from milk, before or after two years, would be incorrect.

Having brought up the issue of weaning the baby, the Qur'an emphasizes, by stating (with mutual consent and consultation) that this weaning is to be consented and consulted by both parents.

The requirement of the consent of the father and the mother (the heir and the mother) is a factor restraining unilateral decision of each one of them on weaning the baby before two years.(۸)

Consultation and conferring, from the viewpoint of the Qur'an, is among the qualifications for

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۱ - Ibn Kathir Qurashi, Isma'il, Tafsir al-Qur'an al-'Azim, ۱/۲۹۱; Tha'alibi, 'Abd al-Rahman, Al-Jawahir al-Hisan, ۱/۴۷۰; Khuza'i Nayshaburi, Husayn b. 'Ali b. Muhammad, Rawdh al-Jinan wa Rawh al-Janan, ۳/۲۸۶; Wa'iz Kashifi, Husayn, Tafsir-i Mawahibun 'Alayh, ۴ vols. ۱st edition, Iqbal Bookstore, Tehran, ۱۳۵۷/۱۹۳۸; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ۲/۲۹; Sharif Lahiji, Shaykh 'Ali, Tafsir-i Sharif-i Lahiji, Mu'assisa Matbu'ati 'Ilmi, ۱۳۶۳ sh/۱۹۸۴; Tabrisi, Fadhl b. Hasan, Majma' al-Bayan, ۱/۳۳۳; Shubbar, Sayyid 'Abd Allah, Al-Jawhar al-Thamin, ۱/۲۳۵; Ha'iri Tehrani, Muqtaniyat al-Durar,

۲/۷۶; Shirazi, Sayyid Muhammad Husayn, Taqrib al-Quran, ۲/۸۶; Maghniyya, Muhammad Jawad, Al-Kashif, ۱/۳۵۶.

۲- Qummi, ʿAli b. Ibrahim, Tafsir al-Qummi, ۱/۷۶; Musawi Sabzwari, ʿAbd al-ʿAli, Mawahib al-Rahman, ۴/۵۸.

۳- Ibn Jawzi, ʿAbd al-Rahman, Zad al-Masir, ۱/۲۴۲.

۴- Qummi, ʿAli b. Ibrahim, Tafsir al-Qummi, ۱/۷۶; Tabari, Muhammad b. Jarir, ʿJamiʿ al-Bayanʿ, ۲/۶۸۶; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Tibyan, ۲/۲۵۵; Ibn Hajar ʿAsqalani, Fath al-Bari, ۹/۴۱۶.

۵- Ibn Hajar ʿAsqalani, Fath al-Bari, ۹/۴۱۶; Taliqani, Sayyid Mahmud, Partuwi az Qur'an, ۲/۱۵۶.

۶- Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۱۰۵ No. ۳۵۵; Kulayni, Muhammad b. Yaʿqub, Al-Kafi, /۴۴۳, No. ۲-۳ and ۶/۱۰۳, No. ۳; Tamimi, Nuʿman b. Muhammad, Daʿa’im al-Islam, ۲/۲۴۱, No. ۹۰۳ and ۲۹۰, No.۱۱۰۹; Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۵۰۹, No. ۴۷۸۸.

۷- Tabari, Muhammad b. Jarir, ʿJamiʿ al-Bayanʿ, ۲/۶۸۶; Sanʿani, Al-Musannaf, ۷/۵۷, No. ۱۲۱۷۴; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Tibyan, ۲/۲۵۵; Janabadhi, Sultan Muhammad, Bayan al-Saʿada fi Maqamat al-ʿIbada, ۱/۲۰۵.

۸- Tabari, Muhammad b. Jarir, ʿJamiʿ al-Bayanʿ, ۲/۶۶۷; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ۲/۲۹; Faydh Kashani, Al-Safi, ۱/۲۳۹; ʿAmili, ʿAli b, Husayn, Al-Wajiz fi Tafsir al-Qur'an al-ʿAziz, ۱/۱۹۱.

weaning the baby. Nevertheless, whom should be conferred, the baby's parents or the parents and other people?

The question arises since, when talking of consent (taradhin), Allah limits its range of application to the baby's father and mother by using the adverb minhuma (each one of them, translated here as mutual) and thus deems consent of others as unnecessary; however, when talking of consultation (tashawurin), He uses it without any adverb.

Some believe that not mentioning the adverb minhuma for consultation is simply due to the literary structure of the Arabic language, and for this reason, the parents can wean their baby after consent and consultation with each other.

In contrast, some believe that not mentioning the adverb minhuma for consultation suggests that consultation is not restricted to the parents alone, rather it includes child nutrition specialists (specialized physicians), which indicates the significant role of conferring with specialists in the field of Islamic legislation.

Although there seems to be no basic difference between these two views, as the parents' consultation with one another is for the purpose of recognition of their own baby's interests and if they are not in a position to recognize it, they would naturally refer to child nutrition specialists and experts.

Obviously, in both cases, whether the consulted party is the parent or another person, the consultation has to be directed towards the child's interests and benefits.(۱)

Consultation following consent indicates that any agreement that is reached between the parents in this respect is not sufficient by itself. Since there is

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۱- Tabrisi, Fadhl b. Hasan, 'Majma' al-Bayan, ۱/۳۳۳.

the possibility that both of them are benefiting from this agreement the father wishes to shun the financial burden, and the mother would like to live her personal life and get rid of the child's attachment to her.

Thus, consent alone is not enough; rather, this consent has to be for the child's interests, which will be obtained through consultation to safeguard the child from any harm.(۱)

It is clearly implied from what was said that weaning the baby needs to be consented by both parents and no one's view is preferable to the other. Therefore, giving priority to the mother in this respect and the father's being subject to the mother does not have a Qur'anic basis. However, it should be noted that the parents' consent and consultation for weaning the baby is permissible only after the baby has been breastfed for twenty one months, as it was stated before that observing the least

length of time for breastfeeding the baby is obligatory. Therefore, fisal – as some claim(۲) – cannot occur without time limit, rather it is applicable within the complementary period, which is between twenty one to twenty four months.(۳)

Leaving the Baby with a Foster Suckling–Mother

Suckling the baby is among the problems of the children's life we face in almost all societies.

There is no doubt that mother's milk is the best food for the child; however, despite the importance of this issue, there are mothers who for some problems are not able to breastfeed their child, or if they are, they are not willing to

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۱- Musawi Sabzwari, ʽAbd al-ʽAli, Mawahib al-Rahman, ۴/۵۸.
۲ - See: Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ۲/۲۹; Tabataba'i, Muhammad Husayn, Al-Mizan, ۲/۲۵۱.
۳- Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۰.

do so.

The easiest way to solve this problem, which has since long ago been pursued by many, is to find a substitute for the mother and to leave the baby with the woman who is able to breastfeed.

Taking care in choosing the suckling foster mother has been greatly emphasized in some Islamic sources, since breastfeeding the baby, besides providing for its nutritional needs, can have profound impact on its mind and soul:

"Look who is breastfeeding your baby, as the baby nourishes with that [milk]."(۱)

"As you select a woman for marriage, so also select women for breastfeeding your babies, for breastfeeding changes natural disposition.(۲)

Therefore, it is quite natural that for selecting a foster suckling-mother, besides the

ability to breastfeed, the legislator deems the other factors such as mental and :physical health, chastity, and even outward beauty as effective

I asked the Imam (A.S.) whether it is appropriate to choose an adulterous woman for" breastfeeding my child. The Imam (A.S.) said: Neither she nor her daughter is (appropriate for such a task."(۳

Do not choose a feeble-minded or bleary-eyed woman for breastfeeding your child," (as milk transfers (the features)."(۴

Choose a good-looking woman for breastfeeding your child and beware of the ugly-" (faced woman, as milk transfers (the features)."(۵

It is upon you to choose a good-looking foster suckling-mother, as milk transfers" ((the features)."(۶

It is understood that these traditions are not comparing the mother's milk with that of other than mother; they only introduce criteria for choosing foster suckling-mother, .the effects of which would not be lasting

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.Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/۴۳, No. ۱۰ -۱

Himyari, ʿAbd Alla b. Jaʿfar, Qurb al-Isnad, ۱st edition, Al al-Bayt Institute, Qum, - ۲ .۱۴۱۳/۱۹۹, p. ۹۳, No, ۳۱۲

ʿAli b. Jaʿfar, al-Imam al-Sadiq, Masa'il ʿAli b. Jaʿfar wa Mustadrakatiha, ed. Al al- -۳ Bayt Institute, ۱st edition, Imam Reza World Congress, Mashhad, ۱۴۰۹/۱۹۸۹, p. ۲۸۲, No. .۷۱۱

.Ibn Babwayhh, ʿUyun Akhbar al-Ridha (A.S.), ۱/۳۷, No. ۶۷ -۴

.Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/۴۴, No. ۱۲ -۵

.Ibid, ۶/۴۴, No. ۱۳ -۶

So, it is not implied from these traditions that a good-looking mother's milk is better than that of an ugly-faced mother. Particularly because according to some traditions,

avoidance of choosing certain women as foster suckling-mothers is for the existence .of other factors than milk in them

For example, it is related concerning not choosing a non-Muslim woman for :breastfeeding a Muslim child

I asked the Imam (A.S.) whether it was appropriate for a Muslim man to choose a" Jewish or Christian foster suckling-mother for his child, while they drink wine. The Imam (A.S.) said: When they breastfeed your babies, do not permit them to drink (wine."(١

The Holy Qur'an has examined the issue of hiring a foster suckling-mother for one's :child in the following statement

And if you want to have your children wet nursed [hire a foster suckling-mother],(there will be no sin upon you so long as you pay what you give in accordance with (honorable norms.) (٢:٢٣٣

The first question arising in respect to this Qur'anic statement is 'Who is this '?statement addressed to

Some claim that it is addressed to parents; thus, leaving the child with a foster (suckling-mother is possible when both parents share this intention.(٢

In contrast, some also maintain that God has given the right to hire a foster suckling-mother for the baby only to its parents, since the expenses of the child rest with the (father.(٣

The afore-mentioned explanations clarify that the Qur'an has given the primary right to breastfeeding to the mother of the baby; therefore, leaving the

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.Himyari, Qurb al-Isnad, p. ٩٣, No, ٣١٢ -١

Qurtubi, Al-Jami' li-Ahkam al-Qur'an, ٣/١٧٢; Tha'alibi, 'Abd al-Rahman, Al-Jawahir -٢

.al-Hisan, ۱/۴۷۱; Ibn Kathir Qurashi, Isma'il, Tafsir al-Qur'an al-'Azim, ۱/۲۹۱
'Alawi Husayni, Muhammad Karim, Kashf al-Haqa'iq 'an Nukat al-Ayat wa al- - ۳ Daqa'iq, ۳ vols. ۳rd edition, Haj 'Abd al-Majid - Sadiq Nowbari Publication, Tehran, ۱۳۹۶/۱۹۷۶. ۱/۱۶۷; Tabrisi, Fadhl b. Hasan, 'Majma' al-Bayan , ۱/۳۳۳; Ha'iri Tehrani, Muqtaniyat al-Durar, ۲/۷۶; Shirazi, Sayyid Muhammad Husayn, Taqrib al-Quran, ۲/۸۶; .Sabziwari, Muhammad, Al-Jadid, ۱/۲۸۶

baby with a foster suckling-mother is permissible in case this right is not ignored. Thus, it is with the mother's consent and considering her priority that a foster suckling-mother can be hired.(۱) Moreover, it is feasible when the mother is not able to breastfeed her baby due to illness, pregnancy, or lack of milk, or else, she would fail to do her duty as a mother for having married, demanding more wages, and so (forth.(۲

With the statement, (so long as you pay what you give in accordance with honorable norms), the Qur'an makes leaving the baby with a foster suckling-mother conditional on payment of the mother's due right.(۳) The mother's inability to breastfeed or her unwillingness to do so, , does not allow the father to use it as a pretext to ignore her previous rights; rather, he is obliged to pay her wages thoroughly and in accordance (with honorable norms up to the time she had breastfed her baby.(۴

(Part Two: A Study of the Legal Issues of Child Custody (Hidhanat

Child Custody According to the Holy Qur'an

It was explained in part one that according to the teachings of the Qur'an the mother is obliged to breastfeed her baby up to twenty one months after its birth. It is clear, however, that besides feeding on milk, the baby needs certain caring to keep on nourishing; and this caring is to be performed, in normal circumstances, by someone .who has the most emotional and physical relations with that baby

Talking about taking care of the child, which is called hidhanat (custody) in juridical and legal texts, has since

Suyuti, Jalal al-Din, Al-Durr al-Manthur, ١/٢٨٧; Taliqani, Sayyid Mahmud, Partuwi az -١ .Qur'an, ٢/١٥۶

Bayhaqi, Ahmad b. Husayn, Sunan, ٧/۴٧٨; Tabari, Muhammad b. Jarir, 'Jami' al- -٢ Bayan', ٢/۶٨٨-۶٨٩ Khuza'i Nayshaburi, Husayn b. 'Ali b. Muhammad, Rawdh al-Jinan .wa Rawh al-Janan, ٣/٢٨۶

For more information about other implications of this statement, see: ١. Paying -٣ wages to the foster suckling-mother: Ibn Jawzi, 'Abd al-Rahman, Zad al-Masir', ١/٢۴٣; Tha'alibi, 'Abd al-Rahman, Al-Jawahir al-Hisan, ١/۴٧١; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Tibyan, ٢/٢۵۵; Kashani, Mulla Fath Allah, Manhaj al-Sadiqin, ٢/٢٩; ٢. Accepting to leave the baby with a foster suckling-mother: Shawkani, Muhammad b. 'Ali b. Muhammad, Fath al-Qadir, ١/٢۴٧; Tabrisi, Fadhl b. Hasan, 'Majma' al-Bayan , ١/٣٣٣; Qurtubi, Al-Jami' li-Ahkam al-Qur'an, ٣/١٧٣; ٣. Surrendering to Allah's command: .Suyuti, Jalal al-Din, Al-Durr al-Manthur, ١/٢٨٧; ۴. Pledging not to inflict harm

Shawkani, Muhammad b. 'Ali b. Muhammad, Fath al-Qadir, ١/٢۴; Tabari, -۴ Muhammad b. Jarir, 'Jami' al-Bayan', ٢/۶٨٩-۶٩٠; Tusi, Abu Ja'far Muhammad b. Hasan, .Al-Tibyan, ٢/٢۵۵; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, ١/٣۶۵

long ago been of interest to the Muslim scholars. In addition, because of its significance and the great role it plays in forming and adjusting socio-familial relationships, it has been examined in various chapters of legal books and the .(.traditions of the infallible household of the Prophet (S.A.W

Although the root word hadhana and its derivatives are not used in the Holy Qur'an, but the root kafala concerning the issue of child custody and providing for its needs have been brought up in two instances; one about the Prophet Moses (A.S.) and the .(.other for the Holy Mary (S.A

In the two suras of Surat Ta Ha and Surat al-Qasas, God mentions the story of Moses. When his mother put him afloat in an ark and Asiya, Pharaoh's wife, took him from the water, he rejected the breasts of the foster suckling-mothers. Afterward he was :returned to his family as per her sister's advice

When your sister walked up [to Pharaoh's palace] saying, "Shall I show you someone(

who will take care of him (yakfuluhu)?" Then We restored you to your mother, that ,(she might be comforted and not grieve.)(۱)

And We had forbidden him to be suckled by any nurse since before. So she said,"(Shall I show you a household that will take care of him (yakfulunahu) for you and will (be his well-wishers?)(۲)

The motivation behind sending back Moses (A.S.) to his family was to undertake his kifala (taking charge of his care), except that kifala in the first

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۱- Q. ۲۰:۴۰.

۲- Q. ۲۸: ۱۲.

statement refers to one person and in the second to a group, i.e. the household of .(Moses (A.S.

Thus, by definition, kifala includes tasks that are partly done by the foster suckling-mother and partly by other people, or at least part of those tasks could be undertaken .)by others, which is clearly implied from the statement (and will be his well-wishers

In Surat Al-i 'Imran, the holy Qur'an brings up the issue of taking charge of Mary's care (kifala) by Zechariah. Having stated how 'Imran's wife dedicated to Him what was in her belly and the birth of Mary, Allah first emphasizes that Zechariah took :charge of Mary's care

Thereupon her Lord accepted her with a gracious acceptance, and made her grow((up in a worthy fashion, and He charged Zechariah with her care.).(۱)

Then He mentions that charging him with her care has been determined by casting :lots

These accounts are from the Unseen, which We reveal to you, and you were not with(them when they were casting lots [to see] which of them would take charge of Mary's

(care (yakfulu), nor were you with them when they were contending.)(۲)

Choosing a guardian (kafil) by casting lots denotes a disagreement existing between Zechariah and the dignitaries of Bani Israʿil, which the Qur'an points out with surprise. A disagreement that can be an outcome of everybody's desire to take charge of Mary's care, as it can be due to everyone's unwillingness to do so, as well. In the former case, Mary's moral-spiritual

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.Q. ۳: ۳۷ -۱

.Q. ۳: ۴۴ -۲

merits and certain familial and social considerations lead to casting lots and in the (latter case, the adverse economical conditions caused by draught prompted it.(۱)

Three possibilities have been brought up in exegetical texts as to when the .disagreement over Mary's guardianship occurred

a) Upon her birth and being handed over to the mosque by her mother in order to .fulfill her vow

.b) While she became an orphan as she lost her parents

(c) While she reached maturity and Zechariah's inability to provide for her livelihood.(۲)

It is clearly understood from what was said above that kifala (guardianship), at least in its Qur'anic application, is used in a more inclusive meaning than child custody. Kifala in this usage includes all aspects of a human being ranging from breastfeeding to provision for his/her living expenses and caretaking without any time limitation; but custody does not enjoy such comprehensiveness, as will be explained in the following .chapters

Preliminary Discussions

The term hidhana in Arabic is derived from the root hadhana. In Arabic hadhana

means "the distance between the armpits to the loins", "the chest and the two arms ."and what includes in between", that can be summed up as "embrace

Accordingly, hidhana, which can grammatically be either infinitive or noun(۳), means, "to clasp the baby to one's breast", "to nurture the baby", "to embrace the baby", (which can be viewed as a synonym to "nursing" and "wet nursing".(۴

In Islamic jurisprudence, hidhana is used in its lexical meaning(۵) and it does not have (a new meaning (legal reality

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۱- Tusi, Abu Ja'far Muhammad b. Hasan, Al-Tibyan, ۲/۴۵۹-۴۶۰; Tabrisi, Fadhl b. Hasan, Majma' al-Bayan, ۲۸۳; Shawkani, Muhammad b. 'Ali b. Muhammad, Fath al-Qadir, .۱/۳۳۹

۲- Tabari, Muhammad b. Jarir, 'Jami' al-Bayan', ۳/۳۳۱; Faydh Kashani, Al-Safi, ۱/۳۳۶; Qummi Mashhadi, Kanz al-Daqa'iq, ۲/۸۷; Tabrisi, Fadhl b. Hasan, 'Majma' al-Bayan, .۲/۲۹۲

۳ - Ibn Hajar 'Asqalani, Subul al-Salam, Mustata al-Albabi Halabi, ۱۳۷۹/۱۹۵۹,۳/۲۲۷; Fayyumi, Ahmad b. Muhammad, Al-Misbah al-Munir, ed. Muhammad Muhi al-Din 'Abd .al-Hamid, ۱۳۴۷/۱۹۲۷, ۱/۱۹۳

۴ - See: Jawahiri, Isma'il b. Hammad, Al-Sihah, ۵/۲۱۰۱; 'Lisan al-'Arab, ۱۳/۱۲۲-۱۲۴; .Zubaydi, Muhammad Murtaza, Taj al-'Arus, ۹/۱۸۰-۱۸۱

۵- 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۹۵ and ۳۱۱; idem, Tahrir al-Ahkam, ۱/۲۴۷; idem, Idhah al-Fawa'id, ۳/۲۷۳; Karaki, 'Ali b. Husayn, Jami' al-Maqasid, ۷/۱۲۹ and ۲۴۶; Najafi, Muhammad Hasan, Jawahir, ۲۷/۲۹۳; Sayyid Sabiq, Fiqh al-Sunna, ۳ vols. Dar al-Kutub .al-'Arabiyya, Berut, n.d., ۲/۳۸۸

as some believe. Thus, using the word wilaya in the meaning of "guardianship" for – .the definition of hidhana(۱) would not be correct

Among the issues open to discussion about custody is whether it is a right or a decree. Some believe that religious laws (legal fabrications) are divisible into right and decree, the most important difference of which is in transferability of their use to others; and

also the possibility of refusing to use it (isqat = relinquishment) in case it is a right and (the impossibility to do so in case it is a decree.(٢

If we accept that transferability and relinquishment are two basic features of right, .then it is argued whether child custody is a right or a decree

To those who believe custody is a kind of guardianship (wilaya), it is a decree, for wilaya is among the granted legal decrees which are removed or devised by the grantor or legislator and the one who is religiously accountable (mukallaf) has no option in fabricating or not fabricating them; consequently, neither of the parents can .refuse to accept it

However, those who do not regard wilaya as valid in the concept of custody, naturally view it as among the rights; as a result either of the parents would be permissible to (refuse to take care of the child (accept its custody).(٣

To our opinion, even if we regard custody to be among the rights, no conclusion can be made from it for the permissibility to refuse to put it into action

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۱ - See: ʿAllama Hilli, Tahrir al-Ahkam, ۲/۴۳; idem, Qawaʿid al-Ahkamʿ, ۳/۱۰۱; idem, Idhah al-Fawa'id, ۳/۲۶۳; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶; ʿAmili al-Faqʿani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Maʿrifat Siyagh al-Niyyat wa al-Iqaʿat wa al-ʿUqud, ed. Muhammad Barakat, Maktibat al-Imam al-ʿAsr, Shiraz, ۱st edition, ۱۴۱۸/۱۹۹۷, p. ۲۰۴; ʿAllama Hilli, Idhah al-Fawa'id, ۲/۱۳۹; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۰; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۳; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۵/۴۵۸; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۲۱; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, ۲۵/۸۳; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۱۶۰; Fathullah, Dr. Ahmad, Muʿjam-i Alfadh al-Fiqh al-Jaʿfari, ۱st edition, Mtabiʿ al-Madukhal, .۱۴۱۵/۱۹۹۵, p. ۱۶۲

۲ - Tawhidi, Muhammad ʿAli, Misbah al-Fiqaha, ۷ vols. ۳rd edition, Qum, Matbaʿa al-Sayyid al-Shuhada, ۱۴۱۲/۱۹۹۲., ۲/۴۷; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq,

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Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۴; Khwansari, Sayyid Ahmad, Jami' al- - ۳
.Madarik, ۴/۴۷۲-۴۷۳

in all cases; for, right is divisible in one aspect into two types of natural-innate and .entrusted

The entrusted right is an authority given to a person by law and perhaps it can be viewed as synonym to "sovereignty"; natural right, however, is one genetically .enjoyed by everybody without requiring any legal authority, like right to freedom

Accordingly, undertaking a person's custody takes place in one of the following two ways: ۱. Genetic (natural) and ۲. Legislative (granted); for, in some cases, one's genetic relationship with another person in itself is sufficient to undertake their custody, but in some other cases, one has to be permitted to take over a task or .someone's affairs

For example, every human being undertakes their own affairs because of their innate authority over themselves without needing anything or anyone in this authority; in contrast, however, if they wish to interfere in others' lives and undertake to manage (them, they have to have permission for it.(۱

In cases where the custody of parents is concerned, mention is made of a natural-.genetic right that is created as soon as a filial relationship is realized

Naturally, such a right cannot be relinquished so much as the genetic relationship between the child and its parents cannot be relinquished, especially if we remember that custody is a reciprocal right. On one side is the child and on the other either the father or mother. On one hand if the child is not protected, it would fall prey to annihilation – so the parents

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It is by this same consideration that in relation to establishing the principle of - ۱

guardianship (wilaya) it is stated that the principle is (taken to be based on) the non-guardianship and non-authority of a human ruling over another human being, because every human being is created free and independent and, in terms of creation and nature, is dominant over their own life, property, and mind. See: Muntaziri, Husayn ʻAli, Dirasat fi Wilayat al-Faqih wa Fiqh al-Dawlat al-Islamiyya, ٢nd edition, Al-Markaz al-ʻAlimi li al-Dirasat al-Islamiyya, ١۴٠٩/١٩٨٨, ١/٢٧.

are obliged to protect and support their child, and on the other hand, the realization of father-child or mother-child relationship itself necessitates the parents and not other people to undertake their child's care.

Therefore, it is incumbent on the parents to fulfill their duties in this respect and they are not allowed to shun this responsibility, for failure in this case would inflict serious harms on the child.(١)

However, as we will explain in the following chapters, besides the parents and the child's blood relatives who naturally undertake the child's custody; there are other people who can undertake this task, such as a person who by specific conditions can undertake the custody of abandoned babies.

Although picking up abandoned babies from public passageways (iltiqat) is a collective obligation, by leaving the baby to the finder of the baby or any other person through the organizations which are authorized to make decisions about such a baby, that person is privileged (permitted) to undertake the baby's custody.

This privilege or right is a legal right according to which God has given the person the responsibility of taking care of a baby and that person has the right to relinquish or transfer it to others. As he can discontinue his cooperation in this respect or due to losing the competence for taking care of the baby the right to custody is taken back from them.

Finally, it is concluded from all the traditions related from the Infallible Imams (A.S.) that from the viewpoint of Islamic law, taking care

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Sayyid Sabiq, Fiqh al-Sunna, ۲/۳۳۸-۳۳۹; also, for more information about the reasons -۱ of those who regard custody as an unrelinquishable right and criticism of them, see: Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Al-Rawdhat al-Bihiyya, ۵/۴۶۴; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۴; Tabataba'i, Sayyid ʻAli, Riyadh al-Masa'il, ۲/۱۶۳; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۲۲/۳۰۵; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۷; Jaza'iri, Sayyid ʻAbd Allah, Al-Tuhfat al-Saniyya fi Sharh .Nukhbat al-Muhsiniyya, manuscript, Astan Quds Razavi, p.۲۹۶

of the child is the father's main responsibility; although at a juncture this responsibility is transferred to someone else such as the mother. In all the traditions dealing with the mother's entitlement (precedence) to the custody of the child, it is stressed that the mother's priority is temporary and at a certain due time, it is nullified.(۱) Nevertheless, the traditions stating the father's status mention his priority and entitlement (precedence) without any limitation or determining a specific due time and as an inclusive law (a man is more entitled than a woman to his child's custody (ecause of his status as a father).(۲

Stages of Child Custody

point

The issue of child custody is examinable in two stages: the infancy and afterwards; or, .in other words, before and after two years of age

It is evident that the issue of custody and who should undertake this responsibility is brought up when the parents have been separated; but in case of continued matrimony, this issue is out of discussion because the parents cooperate in taking .care of their child

Child Custody before the Age of Two .۱

point

Some jurists believe that the custody of a child before the age of two is to be undertaken by the mother(٣); others believe that the custody of the child is upon both (parents, even though they are separated.(۴

Despite certain arguments(۵), the most significant reason that the proponents of both .views present is the traditions related from the Infallible Imams in Islamic sources

:Regarding their content, these traditions are divisible into three categories

Partnership of both parents in child custody (the .١

Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/١٠٣, No. ١ and ۴۵, No. ٣; Ibn Babuwayh -١ Qummi, Man la Yahdhuruhu al-Faqih, ٣/۵٠٩, No. ۴٧٨٨ and ٢٧۵, No. ١٣٠٣ and ١٣٠۵; Hurr ʿAmili, Muhammad Hasan,Wasa'il al-Shiʿa, ١۵/١٩١, No. ٢-٣, and ١٩٢, No. ٧; Yusufi, Hasan .b. Abi Talib, Kashf al-Rumuz, ٢/٢٠١

Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ٨/١٠۵, No. ٣۵٣; Ibn Babuwayh - ٢ Qummi, Man la Yahdhuruhu al-Faqih, ٣/٢٧۵, No. ١٣٠۴. For more information, see: Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ٢/١٠۶-١٠٧; Makki, Muhammad b. Mansur, .Al-Sara'ir, ٢/۶۵٢; Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p.٢٩۵

Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawaʿid wa al-Fawa'id fi al-Fiqh wa -٣ al-Usul wa al-ʿArabiyya, ed. Sayyid ʿAbd al-Hadi Hakim, ٢ vols. Maktibat al-Mufid, n.d., ١/٣٩۵; Miqdad Suyuri, Nadhd al-Qawaʿid al-Fiqhiyya ʿala Madhhab al-Imamiyya, ed. ʿAbdul Latif Kuhkamari, Ayatollah Marʿashi Library, Qum, ١۴٠٣/١٩٨٢, ۴٣٣; Sabziwari, .Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ١٩٣

Ibn Fahd Hilli, Al-Muhadhdhab al-Bariʿ, ٣/۴٢۶; also, to learn about its criticism, see: -۴ ʿAmili, Sayyid Muhammad, Nihayat al-Maram, ١/۴۶۶; Tabataba'i, Sayyid ʿAli, Riyadh al-.Masa'il, ٢/١۶٢

See: Najafi, Muhammad Hasan, Jawahir, ٣١/٢٨۵; Kulayni, Muhammad b. Yaʿqub, Al- -۵ Kafi, ۵/۴٩٢, No. ١; Tusi, Abu Jaʿfar Muhammad b. Hasan, Tusi, Al-Amali, ed. Biʿthat .Institute, ١st edition, Dar al-Thiqafa, Qum, ١۴١۴/١٩٩٣., p. ٣۴٢, No. ٧٠٠

(tradition related by Dawud b. Husayn).(١

Child custody as exclusive to the mother: Viewing the mother as more deserving .۲ (ahaqq = more rightful) towards her child, these traditions state this priority sometimes in respect to breastfeeding(۲) and at other times irrespective of it.(۳) As a result, some jurists argue that the lack of reference to the object of this priority (omission of the dependent – muta'allaq) denotes the generality of mother's priority in the custody of her child. Moreover, they claim the correlation between breastfeeding (ridha') and child custody (hidhanat) have implied that during the (breastfeeding period the child custody rests with the mother.(۴

Child custody as Exclusive to the mother (absoluteness of the tradition is related by .۳ (Ibn 'Abbas and Fudhayl b. Yasar).(۵

Survey and Summation of the Narrations

The first group of the traditions, including that of Dawud b. Husayn, is reliable in sanad (chain of transmission). This tradition in itself includes all parents, either divorced or still in marriage bond, and denotes that taking care of the child in its first two years of .life, i.e., infancy, is upon both the parents who share this task together

However, it must be noted that, as an explanation of the statement of the verse ۲۳۳ of Surat al-Baqara: (Mothers shall breastfeed their children for two full years), the Imam (A.S.) has uttered the statement "So long as the baby is suckling, its custody is equally shared between the parents". In addition, we said previously that this verse suggests that after separation from their husbands, the mothers

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.Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۶/۴۵, No. ۴ -۱

Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۶/۱۰۳, No. ۳ and ۴۱, No. ۶ and ۴۴, No. ۱; Ibn -۲ Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۵۰۹, No. ۴۷۸۸; Tamimi, Nu'man b. .Muhammad, Da'a'im al-Islam, ۲/۲۵۶, No. ۹۷۶

Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۲۷۵, No. ۱۳۰۳, ۱۳۰۵; Kulayni, -۳ Muhammad b. Ya'qub, Al-Kafi, ۶/۴۵, No. ۳; Hurr 'Amili, Muhammad Hasan,Wasa'il al-.Shi'a, ۱۵/۱۹۲, No. ۷

Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۲۱; Ruhani, Sayyid - ۴ .Muhammad Sadiq, Fiqh al-Sadiq, ۲۲/۳۰۲-۳۰۳

Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۱۰۵, No. ۳۵۳; Ibn - ۵ .Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۲۷۵, No. ۱۳۰۴

are obliged to breastfeed their babies for two full years if their husbands ask them to do so, and that the babies can be weaned before two years only if the parents make .such decision by mutual consent and consultation

Therefore, the phrase "equally shared between the parents" is derived from the statement (with mutual consent and consultation) and has nothing to do with the issue of hidhanat (custody)(۱), thereby none of the objections raised against the)sanad or evidentiary proof of this tradition by some jurists would be valid.(۲

From among the second group of traditions, although varied in type, only the tradition related by Ayyub b. Nuh via Shaykh al-Saduq is valid in its chain of transmission. The content of which denotes the mother's priority in the custody (hidhanat) of her child .up to the age of seven

Ayyub b. Nuh's tradition has constrained the absoluteness of the third group traditions, i.e. the traditions related by Abi al-ʿAbbas and Fudhayl b. Yasar which denote the father's priority in the custody of his child. The above would sum up to the fact that during the first two years of the child's life (i.e., infancy) the mother is)superior over the father in taking care of the child.(۳

It is worth mentioning that in order to be able to undertake the custody of her child;)the mother has to meet certain qualifications that will be talked about later on.(۴

It is to be noted that a child can be turned over to its mother to

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There are other alternatives in explaining this statement, such as: ۱. the parents - ۱ both share in the child custody, ۲. the child is equally related to both the mother and

the father; and none of them is superior [in this respect] to the other one, ٣. the mother is obliged to breastfeed (ridha) and the father is obliged to pay the wage; this way reaning of the child is equally shared between the father and the mother; see: Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, ٢/١۶٢; Najafi, Muhammad Hasan, Jawahir, .٣١/٢٨۶

٢- Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, ٢/١۶٢; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ٢٢/٣٠۴; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ١/۴۶۶; Bahrani, .Yusuf, Al-Hada'iq al-Nadhira', ٢۵/٨۶

٣- Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ٨/۴٢١; Ruhani, Sayyid .Muhammad Sadiq, Fiqh al-Sadiq, ٢٢/٣٠۴

۴- For more information, see: Muhaqqiq Hilli, Shara'i' al-Islam, ٢/۵۶٧; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi', p. ١٩۴; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ٢/٢٠٠; .Najafi, Muhammad Hasan, Jawahir, ٣١/٢٧٣

be taken care of (custody) during its first two years of life (infancy) as long as the mother consents to breastfeed her child. However, if she rejects to do so, the father is permitted to hire a foster suckling-mother for the child and take it away from its mother;(١) because, as mentioned above, taking care of the child (its custody) is upon the father and the mother would take up this responsibility for a limited period due to a specific reason. Transfer of custody to the mother is sure to occur when the mother breastfeeds her child for free or for a wage equal to that demanded by others; otherwise, the principle of non-transfer of child custody to the mother is in effect.(٢)

٢. Child Custody after the Age of two

Once the infancy period is over while the parents have separated, who should ?undertake the custody of the child

:Answer to this question can be examined in the form of three hypotheses

٢. ١. The parents being alive: In case the parents are divorced and are both alive, there are various views stated by the jurists on the custody of the child in terms of its gender. The most important is the priority of the mother in the custody of a son up to the age of two and a daughter up to the age of seven. To prove this as agreed by all

jurists (consensus), reference has been made to the reconciliation of the traditions and preference of the traditions denoting seven years of age;(۳) of course, none of

p: ۶۱

Bahrani, Yusuf, Al-Hada'iq al-Nadhira', ۲۵/۸۷; Muhaqqiq Hilli, Shara'i' al-Islam, ۲/۵۶۶ -۱ and ۵۶۸; Ibn Barraj Trablusi, Qazi 'Abd al-'Aziz, Al-Muhadhdhab, ۲/۲۶۲; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۶۵۱; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi', p. .۱۹۴; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۲۰۰

It is worth mentioning that in order to prove the annulment of the mother's right to -۲ custody, some jurists have referred to such reasons as: distress and constriction, correlation between custody (hidhanat) and suckling (ridha', the emergence of the term naz' (death agony) in the tradition related by Dawud b. Husayn in the child's separation from its mother, and the concept of ahaqq (more rightfull); as some have claimed – with reference to the practical principle, directing attention in judgment to the dominant case, and the non-correlation between custody and suckling – that the mother's right to custody of her child will not be annulled through her refusing to breastfeed it, which are all criticizable in their context. For more information, see: Jaza'iri, Sayyid 'Abd Allah, Al-Tuhfat al-Saniyya, p.۲۹۵; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, ۵/۴۵۷; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۹۰-۳۰۰, and ۲۸۵; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۶; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۸/۴۳۶; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; 'Allama Hilli, Idhah al-Fawa'id, ۳/۲۶۳; 'Allama Hilli, Tahrir al-Ahkam, ۱/۲۴۷ and ۲/۴۳; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۶۵۲; Qurtubi, Al-.Jami' li-Ahkam al-Qur'an, ۳/۱۶۹

See: Ibn Barraj Trablusi, Qazi 'Abd al-'Aziz, Al-Muhadhdhab, ۲/۲۶۲; Muhaqqiq Hilli, -۳ Shara'i' al-Islam, ۲/۵۶۷; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi', p. ۱۹۴; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۲۰۰; 'Allama Hilli, Tahrir al-Ahkam, ۱/۲۴۷ and ۲/۴۳; 'Allama Hilli, Tabsirat al-Muti'allimin, p. ۱۸۷; Shahid Awwal, Muhammad b. Makki 'Amili, Al-Lum'at al-Damishqiyya, p. ۱۷۶; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۶; 'Allama Hilli, Mukhtalaf al-Shi'a, ۷/۳۰۸; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۹۱; Shahid Thani, Zayn al-Din b.

.ʿAli ʿAmili, Masalik al-Afham, ۸/۴۲۱-۴۲۲

these reasons are sufficient to prove it and the differentiation between a son and a daughter concerning custody does not seem right.(۱)

As stated previously, the custody of the child, although after being weaned, is the main responsibility of the father; however, the mother is also given the right to undertake this responsibility up to the age of seven if she wishes so irrespective of the child's gender.(۲)

The best evidence for proving this view is the tradition related by Ayyub b. Nuh, which explicitly states: "The woman is more deserved to [take care of] her child until it reaches seven, unless she wishes otherwise."(۳) It is obvious that this statement can constrain the absoluteness of the tradition related by Dawud, the tradition related by Abi al-ʿAbbass and the one related by Fudhayl b. Yasar(۴) denoting the father's priority, and regard his right as authorized after the age of seven.(۵)

۲ .۲. Either of the parents being alive: In case the mother dies while undertaking the custody of her child (to the age of seven), the responsibility of the child custody will be transferred to the father.(۶) Since the child custody – as it was said before – is the responsibility of the father and it is transferred to the mother for seven years in case she desires so; therefore, the father has priority over others in his child's custody. The possibility of transferring this privilege to the child's maternal grandmother – as Ibn Barraj has asserted – does not sound correct.(۷)

However, if

۱- See: Bahrani, Yusuf, Al-Hada'iq al-Nadhiraʿ, ۲۵-۸۸; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarikʿ, ۴/۴۷۴; .Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۱۶۲

۲- Al-Wafi, ۳/۲۰۷, chapters on wiladat; Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p.۲۹۶; ʿAllama Hilli, Tahrir al-Ahkam, ۱/۲۴۷ and ۲/۴۴; Tusi, Abu Jaʿfar Muhammad b.

Hasan, Al-Khilaf, ۵/۱۳۱, problem ۳۶; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۶/۳۹; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۲۲/۳۰۴.

۳- Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۴۳۵, No. ۴۵۰۴.

۴- Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۶/۴۵, No. ۴ and ۱; Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۲۷۵, No, ۱۳۰۴.

۵- Other views have also been brought up in Islamic jurisprudence in this respect, such as: mother's priority in custody of her child until the latter's marriage; priority of mother in custody of her son up to the age of two and the daughter up to the age of nine; mother's priority in the custody of her son until the age of seven and the daughter until the mother gets married; mother's priority in the custody of her son until maturity and the daughter until she [the daughter] gets married; mother's priority in the custody of her son until he can eat and dress by himself and the daughter until she gets married; mother's priority in the custody of her son until the age of two in case there is a clash and until the age of seven in case there is no clash; the preference of leaving the son's custody to the mother until the age of seven. For more information concerning the reasons for these views and their criticism, see: Al-Muqni, p. ۳۶۰; 'Allama Hilli, Mukhtalaf al-Shi'a, ۷/۳۰۶, ۳۰۸, and ۳۱۳; Ibn Fahd Hilli, Ibn Fahd Hilli, Al-Muhadhdhab al-Bari', ۳/۴۲۶-۴۲۷ and ۴۲۹; Ibn Barraj Trablusi, Qazi 'Abd al-'Aziz, Al-Muhadhdhab, ۲/۳۵۲; Muhaqqiq Hilli, Shara'i' al-Islam, ۲/۵۶۷; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi', p. ۱۹۴; 'Allama Hilli, Qawa'id al-Ahkam', ۳/۱۰۲; 'Allama Hilli, Tahrir al-Ahkam, ۲/۴۴; Al-Marasim, p. ۱۶۶; 'Al-Muqni'a, p. ۵۳۱; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۸/۴۲۰; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۹۱; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, Riyadh al-Masa'il, ۲/۱۶۲; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, ۲۵/۸۹; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, ۵/۱۳۱, issue ۳۵-۳۶; Makki, Muhammad b. Mansur, Al-Sara'ir, ۳/۶۵۳; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۷-۴۶۸; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۶/۳۹; Khwansari, Sayyid Ahmad, Jami' al-Madarik, ۴/۴۷۴.

۶- Najafi, Muhammad Hasan, Jawahir al-Kalam fi Sharh Shara'i' al-Islam, ۳۱/۲۹۳.

۷- Ibn Barraj Trablusi, Qazi 'Abd al-'Aziz, Al-Muhadhdhab, ۲/۳۵۳-۳۵۴ and ۳۱۸; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶; Jawahir al-'Uqud, ۲/۱۸۹.

the father dies, there is no doubt that the mother would undertake the custody of the child up to the age of seven. However, who should take care of the child after this ?age

Some jurists have mentioned the restoration of custody to the mother and have invoked the verse (the blood relatives are more entitled to inherit from one another in the Book of Allah.)(١) and the verse (neither the mother shall be made to suffer harm on her child's account, nor the father on account of his child).(٢) The jurists' consensus (ijma'), Dawud b. Husayn's tradition, Ibn Sanan's tradition, the practical principle of continuance (istishab), the mother's emotional condition, and the very traditions (concerning hidhanat (custody).(٣

In contrast, there are some other possibilities brought up such as transfer of the child custody to the father's wasi (executor of the father's will),(۴) to the paternal grandmother,(۵) and to the paternal grandfather, of which the latter possibility is (more likely to be correct by all the reasons presented.(۶

None of the parents being alive: If a child loses one of its parents before it reaches .٣ .٢ ?maturity, who must undertake its custody

To answer this question, first we have to look for a specific reason for which one or more persons are determined to undertake this responsibility and if there is not such a reason, seek to decide on someone by means of resorting to the existing .generalities

As it was stated before, this responsibility is transferred to the child's paternal grandfather, since

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.Q. ٨: ٧۵; ٣٣: ۶ -١

.Q. ٢: ٢٣٣ -٢

For more information of how these evidences have been alluded to as well as their -٣ criticism, see: Makki, Muhammad b. Mansur, Al-Sara'ir, ٢/۶۵٢; Najafi, Muhammad

Hasan, Jawahir, ۳۱/۲۹۳; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶-۱۰۷; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۲۲/۳۰۸-۳۰۹; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۱۶۲; ʿAllama Hilli, Qawaʿid al-Ahkamʿ, ۳/۱۰۲; idem, Irshad al-Adhhan, ۲/۴۰; Muhaqqiq Hilli, Shara'iʿ al-Islam, ۲/۵۶۷; Hilli, Jaʿfar b. Hasan, Al-Mukhtasar al-Nafiʿ, p. ۱۹۴; Ibn Barraj Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, ۲/۲۶۲; ʿAllama Hilli, Tahrir al-Ahkam, ۱/۲۴۷ and ۲/۴۴; Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۶/۴۵, No. ۴ and ۴۱, No. ۷.

۴- See: ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۵۱۰; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۵/۶۶.

۵- Al-Muqniʿa, p. ۵۳۱.

۶- Although in regard to custody, none of the jurists have brought up the above possibility, it is asked in the book of inheritance whether one can after his death hand over his child to a stranger to take care of while the child's grandfather is still alive. Giving a negative answer to this question, the Shiʿa jurists – contrary to the Sunnis – have brought up some matters from which it can be concluded that the custody of the child after its father's death rests with its paternal grandfather in case the parents have already divorced and the child is over seven years of age. For more information, see: Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, ۴/۱۶۱-۱۶۲, issue ۴۰-۴۱; idem, Al-Mabsut, ۴/۵۴-۵۵ and ۶/۱۵۴-۱۵۵; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۵۸۶, ۵۱۰, ۴۶۰, and ۸۰; Ali Bahr al-ʿUlum, Sayyid Muhammad, Bulghat al-Faqih, ۴th edition, Maktabat al-Sadiq, ۱۴۰۳/۱۹۸۴, ۴/۷۲-۷۳; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۲۰/۳۹۸; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۶/۱۴۴ and ۲۶۸, and ۷/۱۹۵; ʿAllama Hilli, Mukhtalaf al-Shiʿa, ۶/۳۷۸; Makki, Muhammad b. Mansur, Al-Sara'ir, ۳/۲۰۴; Bahrani, Yusuf, Al-Hada'iq al-Nadhiraʿ, ۱۹/۹۴-۹۵ and ۲۲/۱۶; Muhaqqiq Hilli, Shara'iʿ al-Islam, ۲/۴۷۰ and ۵۰۶; Ansari, Shaykh Murtadha, Al-Wasaya wa al-Mawarith, ۱st edition, Baqiri Publication, Qum, ۱۴۱۵/۱۹۹۵, p. ۶۱; ʿAllama Hilli, Tahrir al-Ahkam, ۱/۲۱۹ and ۲/۵۴۱ and ۷ and ۷/۴۱۸; ʿAllama Hilli, Idhah al-Fawa'id, ۲/۵۲; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۳/۲۲۹; ʿAllama Hilli, Tabsirat al-Mutiʿallimin, p. ۱۷۳; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۵/۱۵۱; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus al-Sharʿiyya fi Fiqh al-Imamiyya, ۳ vols. ۱st edition, al-Nashr al-Islamiyya Publication, Qum, ۱۴۱۲/۱۹۹۱ ۲/۳۲۳; Hakim, Sayyid Muhsin, Mustamsik al-ʿUrwat al-Wuthqa, ۱۴ vols. ۴th edition, Dar Ihya' al-Turath al-ʿArabi, Beirut, ۱۳۹۱/۱۹۷۱, ۱۴/۵۹۳;

.Najafi, Muhammad Hasan, Jawahir, ۲۸/۲۷۷

seeing into and appropriation of the child's properties and making decision about its marriage, at least before reaching maturity, is only upon the grandfather to a similar level as its father in his absence. All the more so, then, the child's affairs and custody (rest with him.(۱

In case the child's grandfather is not alive, this responsibility will be transferred to the father's and grandfather's executor. That is because the latter is the exclusive successor of the father and grandfather, who is authorized to intervene in the underage child and it is clear that custody and rearing of the child is among the duties (of the father and the grandfather.(۲

Furthermore, although Ibn Abi ʿUmayr's tradition denotes the mother's priority over the executor, it is also implied from this same denotation that the executor has some (responsibility toward the custody of the child.(۳

In contrast to this view, i.e., transferring the duty of child custody after the death of its parents to its paternal grandfather, other views have also been raised in Islamic jurisprudence, such as: transfer of custody to the child's near of kin according to the hierarchy of their inheritance (awla bi mirathihi)(۴), transfer to the child's paternal kin (ʿusba),(۵) transfer to the child's maternal aunt(۶), which, given the previous .explanations, do not sound correct

Qualifications for Child Custody

Although the mother can take care of her child up to seven years after divorce from her husband, she has to meet certain qualifications for undertaking such a task, the lack of each one of which would

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To prove this view some arguments have been presented which are not free from -۱ dispute. For more information, see: Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۹۵; Shahid Thani, Zayn al-Din b.

ʽAli ʽAmili, Masalik al-Afham, ۸/۴۳۰-۴۳۱; Muhaqqiq Hilli, Shara'iʽ al-Islam, ۲/۵۶۷; ʽAllama Hilli, Qawaʽid al-Ahkamʽ, ۳/۱۰۲; ʽAllama Hilli, Idhah al-Fawa'id, ۳/۲۵۶; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Rawdhat al-Bihiyya, ۵/۴۵۹-۴۶۰; ʽAmili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۷۲.

۲- Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۹۶.

۳- It is worth mentioning that the legal texts maintain that in case of the grandfather's death there are other possibilities such as transfer of the child's custody to the nearest of kin, the child's probable legatees in the order of their inheriting from the child, and to the Islamic ruler. For more information of the reasons for these views and their criticisms, see: Shahid Awwal, Muhammad b. Makki ʽAmili, Al-Lumʽat al-Damishqiyya, p. ۱۷۶; ʽAllama Hilli, Irshad al-Adhhan, ۲/۴۰; Qawaʽid al-Ahkam fi Maʽrifat al-Halal wa al-Haram, ۳/۱۰۲; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶-۱۰۷; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, ۸/۴۳۱; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۹۶; Muhaqqiq Hilli, Shara'iʽ al-Islam, ۲/۵۶۷; ʽAmili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۷۲; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; Bahrani, Yusuf, Al-Hada'iq al-Nadhira, ۲۵/۹۷.

۴- For more information about the reasons set forth by the proponents of this view, their criticisms, as well as the criterion for selecting one of the kin, see: Shafiʽi, Abu ʽAbd Allah Muhammad b. Idris, Al-Umm, ۸ vols. ۲nd edition, Dar al-Fikr, Beirut, ۱۴۰۳/۱۹۸۳, ۵/۹۲; Al-Tuhfat al-Saniyya, p. ۲۹۵; Al-Hada'iq al-Nadhira, ۲۵/۹۶-۹۷; Tusi, Abu Jaʽfar Muhammad b. Hasan Al-Khilaf, ۵/۱۳۴-۱۳۷; Al-Sara'ir, ۲/۶۵۳-۶۵۴; Qatifi, Ibrahim b. Sulayman, Al-Siraj al-Wahhaj li Dafʽ ʽIjaj Qatiʽa al-Lijaj, ۱st edition, Muʽassisa-yi Nashr-i Islami, Qum, ۱۴۱۳/۱۹۹۰.۴۷۴; Al-Muqniʽa, p. ۵۳۱; Ibn Barraj Trablusi, Qazi ʽAbd al-ʽAziz, Al-Muhadhdhab, ۲/۳۵۳; Al-Wafi, ۲/۱۱۹; Al-Wasila, p.۲۸۸; Qurtubi al-Andulusi, Abu Walid Muhammad b. Ahmad (Ibn Rashid al-Hafid) Bidayat al-Mujtahid wa Nahayat al-Muqtasid, ed. Khalid ʽAttar, ۲ vols. Dar al-Fikr, Beirut, ۱۴۱۵/۱۹۹۵, ۲/۴۶; Qurtubi al-Andulusi, Bidayat al-Mujtahid, ۲/۴۳-۴۴; Jawahir al-ʽUqud, ۲/۱۸۸; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۹۶-۳۰۰; Shashi, Muhammad b. Ahmad, Hilyat al-ʽUlama fi Maʽrifat Madhahib al-Fuqaha, Risalat Institute, Beirut, ۱۴۰۰/۱۹۸۰., ۷/۴۳۷; Shara'iʽ al-Islam, ۲/۵۶۷-۵۶۸; Sharh al-Akhbar, ۳/۲۰۱-۲۰۲, No. ۱۱۳۰; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Rawdhat al-Bihiyya, ۵/۴۶۱-۴۶۲; Ishtahardi, Shaykh ʽAli Panah, Fatawi-yi Ibn Junayd, Muʽassisa-yi Nashr-i Islami, Qum, ۱۴۱۶/۱۹۹۶. p. ۲۶۴; Fiqh al-Sadiq, ۲۲/ ۳۱۱; ʽAllama Hilli,

Qawaʿid al-Ahkam, ٣/١٠٢; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ٢/١٠٧; Muzni, Ismaʿil b. Yahya, Mukhtasar al-Muzni, Dar al-Maʿrifa, Beirut, n.d. p. ٢٣٥; ʿAllama Hilli, Mukhtalaf al-Shiʿa, ٧/٣١٠, and ٣١۴-٣١۵; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ٨/۴٣٠-۴٣١ and ۴٣۵; Mughni al-Muhtaj, ٣/۴۵٢; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, ١/۴٧٢-۴٧١.

۵ - Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, ۵/١٣٧-١٣٨; Makki, Muhammad b. Mansur, Al-Sara'ir, ٢/۶۵۴.

۶- Makki, Muhammad b. Mansur, Al-Sara'ir, ٢/۶۵۴; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ٢٢/٢٩۶.

lead to losing her competence to this end.

Of course, it is to be noted that if undertaking the child's custody is subject to the realization of these qualifications, there is no difference in this task between the mother and other people of equal rank or her successors.

Eight qualifications have been stated in old legal texts for confirmation of the mother's competence in the custody of her child:

١. Islam: Since before reaching maturity the child is legally attached to the religion of its father or mother, some jurists believe that the mother can take the custody of her child after separation from her Muslim husband if she is a Muslim herself.

The most important reason for this, notwithstanding the possibility of a non-Muslim mother's influencing her child's beliefs, is the impermissibility of the guardianship of a non-Muslim (unbeliever) over a Muslim child.(١)

To our opinion, however, what is meant by negation of way (nafyi sabil) in the verse (and Allah will never provide the faithless any way [to prevail] over the faithful.)(٢) is not the negation of dominance of the non-Muslims over the Muslims, since a Muslim can have a non-Muslim employer. Rather, it means that the non-Muslim has no reason (argument) for disapproving Muslims. Furthermore, what is meant by child custody is only taking care of the child and has nothing to do with guardianship over the child so that a non-Muslim mother's taking care of a Muslim child may require the

(guardianship of non-Muslims over the Muslims.(۳

Irrespective of

Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۸/۴۲۲; Sabziwari, - ۱ Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۸; ;Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۲۲/۳۰۶

.Q. ۴: ۱۴۱ -۲

Khu'i, Muhammad Taqi, Kitab al-Nikah (Mabani 'Urwat al-Wuthqa), ۲ vols. Dar al- -۳ .'Ilm School, ۱۴۰۷/۱۹۸۶, ۲/۳۱۱; Khwansari, Sayyid Ahmad, Jami' al-Madarik, ۴/۴۷۶

its weak chain of transmission (sanad) and as proportionate to other traditions,(۱) the tradition "Islam takes precedence over all and nothing takes precedence over it"(۲) is dedicated to inheritance and indicates that a Muslim inherits from a non-Muslim but not vice versa.(۳) So, it cannot be proved through this tradition that a non-Muslim (mother cannot take the custody of her Muslim child.(۴

Intellect: Among the basic requirements of the mother's custody of her child is her .۲ being sane. If the mother does not enjoy the soundness of intellect, she cannot undertake her child's custody, because she is not only unable to take care and safeguard her child, but she herself needs someone to take care and custody of (her.(۵

However, the jurists wonder if there is a difference between the periodical and .chronic insanity in this respect

Some of the jurists believe that there is no difference between these two types of insanity; for, taking care of the child (its custody) does not require guardianship over the child; thus, it can be reconciled with insanity and the decision in this regard is left with the mother's legal guardian.(۶) In contrast, some also believe that in both cases the child's custody cannot be left with the mother, unless the recurrence of the

(mother's insanity is extremely low and its duration is not too long.(۷

To our opinion, however, taking care of her child is possible for a mother only in case she enjoys soundness of intellect, because how can an insane person who is

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Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۴/۳۴۴, No. ۵۷۱۷-۵۷۱۸, Awali al- -۱ .Li'ali, ۳/۴۹۶, No. ۱۵; Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۷/۱۴۳, No. ۵

.Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۴/۳۳۴, No. ۵۷۱۹ -۲

It is to be noted that there are other possibilities brought up in the meaning of this -۳ tradition: ۱. Islam will dominate all other religions, ۲. Islam is the best of religions, ۳. The truth of Islam is based on clear evidence and evident proofs, ۴. The non-superiority of a non-Muslim over a Muslim, ۵. Encouraging the Muslims to develop the scholarly global prevalence of Islam, ۶. Islam will not be abrogated, ۷. Devising legal ordinances that lead to the Muslims' superiority, ۸. The license for the precedence of the Muslims over non-Muslims, and ۹. Not legislating ordinances that lead to the non-Muslims' superiority over the Muslims. For more information, see: Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۱۳/۲۰; Yazdi, Sayyid Muhammad Kazim, Hashiyat al-Makasib, ۲ vol. Isma'iliyan Institute, Qum, ۱۳۷۸/۱۹۵۶., ۲/۴۴۶; Tawhidi, Muhammad 'Ali, Misbah al-Fiqaha, ۱/۴۹۰ and ۵/۹۰; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۱۳/۷۵ and ۱۴/۱۵۷ and ۱۵/۴۰; Khu'i, Kitab al-Tahara, ۸/۹۱; Khomeini, Ruhullah, Kitab al-Tahara, ۳ vols. Isma'iliyan Institute, Qum, ۱۴۱۰/۱۹۸۹, ۳/۳۱۱; idem, Kitab al-Bay', ۵ vols. ۴th edition, Isma'iliyan Institute, ۱۴۱۰/۱۹۸۹.۲/۵۴۵; Isfahani, Muhammad Husayn, Hashiyat al-Makasib, ed. 'Abbas Muhammad Al-i Saba', ۱st edition, Matba'a 'Ilmiyya, Qum, ۱۴۱۸/۱۹۹۷., ۲/۴۴۶; Ansari, Muhammad 'Ali, Al-Mawsu'at al-Fiqhiyyat al Maysara, ۳ vols. .۱st edition, Islamic Thought Association, Qum, ۱۴۱۵/۱۹۹۵, ۳۲۸۳

.Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۷۳ -۴

Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۸/۴۲۳; Sabziwari, -۵ Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; Sayyid Sabiq, Fiqh al-Sunna, .۲/۳۴۲; 'Allama Hilli, Qawa'id al-Ahkam, ۳/۱۰۲

Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۷; for more information about the criticism -۶

.of this issue, see: Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۲۲/۳۰۷

Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; Shahid Thani, - ۷ Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۸/۴۲۳; for more information of its criticism, .see: Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۷

?unable to manage his or her own life, be able to take care of another person

Therefore, if the mother is suffering from chronic insanity, she is certainly not qualified to take the custody of her child and transferring this issue to the mother's guardian is baseless, because child custody is not like the right of pre-emption. The right of delimitation, option of cancellation, and similar rights so that with the mother's loss of competence decision about them [her and her child] is transferred to her guardian; rather, child custody is a duty incumbent upon the mother, which will not be .possible to fulfill if the mother is afflicted with insanity

But if the mother's insanity is periodical so that she is able to do her duties, its occurrence will not endanger the child's physical and psychological health and the .mother can in due time undertake her child's custody

Of course, it is evident that if the criterion for the permission of child custody is the mother's capability, she can be judged as not forbidden from her child's custody due to periodical insanity only when its occurrence is not so frequent as to having an impact on the child's life and practically depreciate the mother's ability in taking care (of her child and satisfying its needs.(۱

Freedom: Among the qualifications mentioned in some of the early legal books, .۳ concerning the mother's custody of her child is that she is not a slave, which to our opinion is not a valid qualification at least

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.Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴ -۱

(for the mother.(۱

Although talking about the rules of slavery in our time is useless due to the abolishment of slavery, this issue – by refinement of reason – can be useful in two cases. When the mother is imprisoned for committing a crime or is living in a forced labor camp; for, as the slaves have been deprived of wielding power in most of their daily affairs and unable to make independent decisions about their lives, it is also true .for the person who lives in a prison or a forced labor camp

Now the question is raised that whether the child is sent to prison along with her mother to be taken care of by her, although she is not able to make independent decisions concerning her own daily life affairs. Alternatively, it is separated from the mother to be left with the father or any other person who can legally take its custody because of the inappropriate atmosphere of such places and the destructive effects .that such places may have on the personality growth of the child

۴. Freedom from Matrimonial Rights: According to this qualification, the mother may .not marry while holding her child's custody

To prove this issue, such reasons as consensus of the jurists, failure of mother in her maternal duties when remarried, and several traditions have been relied on, among (which the traditions are of most importance.(۲

In five traditions, reference has been made to the mother's marriage and child custody and it is emphasized that

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۱- For more information about the reasons proposed for the validity of this condition, i.e., contradiction of guardianship with slavery, contradiction of custody with ownership and traditions, as well as their criticism, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۲۲; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; ʿAmili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۸; Ibn Hajar ʿAsqalani, Subul al-Salam, ۳/۲۲۹; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, ۴/۴۷۵-۴۷۶; Bahrani, Yusuf, Al-Hada'iq al-Nadhiraʿ, ۲۵/۹۱; Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۲۷۵,

No, ١٣٠۴; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ٨/١٠٧, No. ٣۶١; Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۵/۴٩٢, No. ١.

٢ - Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ٨/۴٢۴; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ٢/١٠۶; Najafi, Muhammad Hasan, Jawahir, ٣١/٢٩٠; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ٢٢/٣٠۵-٣٠۶; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ١/۴۶٩; Ibn Babuwayh Qummi, Al-Muqni', Imam Hadi Publication, Qum, ١۴١۵/١٩٩۵, p. ٣۶٠; 'Allama Hilli, Mukhtalaf al-Shi'a, ٧/٣٠۶; Ibn Fahd Hilli, Al-Muhadhdhab al-Bari', ٣/۴٢۶.

the mother enjoys the right to have the custody of her child so long as she has not married. Among these traditions, of course, only Dawud Riqqi's is valid in sanad. However, the tradition related by Sulayman b. Dawud b. Minqari is weak for the uncertainty of its transmitter as Hafs b. Qiyath or someone else.(١) The tradition related by 'Abd Allah b. 'Amr b. al-'As is also weak for its lack of sanad and thus both are invalid.(٢)

In Dawud Riqqi's tradition, although the Imam does not directly talk about the prohibition of the mother's getting married, the statement "the slave is not privileged to separate his children from their mother until he is freed even though she is married"(٣) clearly indicates that although the mother's marriage is an obstacle to her taking the custody of her child, but the father's being a slave is an obstacle to hold his child's custody as well. As his obstacle is greater than the mother's being married, the child remains in its mother's custody and upon the removal of the greater obstacle, i.e., the father's slavery, the child is returned to him.

Thus, there remains no doubt that if the mother gets married during her child's first seven years of age while the child's father is alive and there is also no obstacle for her to take care of her child, this marriage will cause the loss of her right to her child's custody, which will then be transferred to the father.(۴)

Of course, it

.Sulayman b. Dawud b. Minqari from Hafs b. Qiyath or other than him -۱
Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۶/۴۵, No. ۵; Ibn Babuwayh Qummi, Man la -۲ Yahdhuruhu al-Faqih, ۳/۴۳۵, No. ۴۵۰۲; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۱۰۵, No. ۳۵۴; Abi Dawud, Sunan ۴/۵۰۸, No. ۲۲۷۶; Ibn Abi Jumhur Ahsa'i, Muhammad b. 'Ali, 'Awali al-Li'ali, ed. Mujtaba 'Iraqi, ۴ vols. ۱st edition, Sayyid al-Shuhada .Publication, ۱۴۰۳/۱۹۸۳., ۳/۳۶۹-۳۷۰, No. ۳۴۶
.Ibid -۳
Muhaqqiq Hilli, Shara'i' al-Islam, ۲/۵۶۷; 'Allama Hilli, Qawa'id al-Ahkam', ۳/۱۰۲; Al- -۴ Wasila ila Nail al-Fadhila, p. ۲۸۸; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۶۵۱; Hilli, Ja'far b. Hasan, Al-Mukhtasar al-Nafi', p. ۱۹۴; 'Allama Hilli, Tabsirat al-Muti'allimin, p. ۱۸۷; Shahid Awwal, Muhammad b. Makki 'Amili, Al-Lum'at al-Damishqiyya, p. ۱۷۶; Tusi, Abu Ja'far Muhammad b. Hasan Al-Khilaf, ۵/۱۳۲; Shahid Thani, Zayn al-Din b. 'Ali .'Amili, Al-Rawdhat al-Bihiyya, ۵/۴۶۳

is clear that the mother's marriage is a barrier to her child's custody when she gets married to a man other than her ex-husband.(۱) That is because if she remarries her ex-husband and the father of her child, the issue of custody is by itself resolved since all the evidences for custody are relevant in case the two have been separated. However, if the father dies, will the mother's marriage still result in the loss of her ?right to her child's custody

Although some jurists believe that in case the father dies, the mother's marriage will not result in losing her right.(۲) To our opinion, as indicated by Dawud Riqqi's tradition, the mother's marriage is an obstacle to her child's custody whether the father is dead or alive, because if the father dies the responsibility of child's custody goes to the paternal grandfather. Thus, with the mother's marriage the custody of her child is .transferred to the father or his successor

It is clear that in this problem the second husband's consent has no effect on the child custody, since the traditions that mention the mother's marriage as an obstacle are effectual irrespective of the second husband's consent or refusal.(۳) In addition, the inhibition of marriage is for observing the right of the father and the child, and this .right is not vindicated with the consent of the mother's second husband

Renewability of the Mother's Right: If we accept that the mother's marriage will ,hinder her from taking the custody of her child

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It is to be pointed out that some of the Sunni jurists claim that if the mother gets -١ married to her child's paternal uncle, her right to custody is not lost and she will keep on taking her child's custody: Minhaji Asyuti, Muhammad b. Ahmad, Jawahir al-ʽUqud, ٢/١٨٩; Sayyid Sabiq, Fiqh al-Sunna, ٢/٣۴۴; Shawkani, Muhammad b. ʽAli, Nayl al-Awtar .min Hadith Sayyid al-Akhyar, ٩ vols. Dar al-Jil, Beirut, ١٣٩٣/١٩٧٣, ٧/١٣٩

Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ١٩۴; Najafi, - ٢ Muhammad Hasan, Jawahir al-Kalam fi Sharh Shara'iʽ al-Islam, ٣١/٢٩۵; Jaza'iri, Sayyid .ʽAbd Allah, Al-Tuhfat al-Saniyya fi Sharh Nukhbat al-Muhsiniyya, p.٢٩۶

Jawahir al-ʽUqudud, ٢/١٨٩; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, -٣ .٨/۴٢۴

then the question is raised that if the mother separates from her second husband, can ?she take back the custody of her child

Some jurists believe that if the mother separates from her second husband during the time that she enjoys the right to her child's custody – i.e., the first seven years of the (child's life – she can take back her child's custody.(١

If we accept such a claim, since in Islamic law a woman's separation from a man (divorce) is possible in two forms of revocable (rijʽi) and irrevocable (ba'in)(٢), two possibilities are set forth. ١. The mother's right to custody is given back to her when she has separated from her second husband by irrevocable divorce, or in case she has separated by revocable divorce, her ʽidda period has to be over.(٣) ٢. The criterion in the mother's renewal of her child's custody is her separation from her second husband, whether by revocable or irrevocable divorce. Since in revocable divorce there is no matrimonial obligation upon the mother, therefore she can freely take (care of her child.(۴

The most significant reasons presented by the proponents of the return (or

restoration) theory – despite the tradition of ʿAbd Allah .b ʿAmr b. al-ʿAs which is not valid for its lack of sanad(۵) – is that the mother's marriage is an obstacle to her child's custody. It is clear that the existence of an obstacle causes a ruling to relinquish ,rather than the lack of an obstacle creating a ruling,(۶) therefore

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۱- Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, ۵/۱۳۳; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. ۱۷۶; Muhaqqiq Hilli, Shara'iʿ al-Islam, ۲/۵۶۸; ʿAllama Hilli, Irshad al-Adhhan, ۲/۴۰; Jawahir al-ʿUqudud, ۲/۱۹۰; Ibn Hamza, Muhammad b. ʿAli, Al-Wasila ila Nayl al-Fadhila, ed. Muhammad al-Hassun, ۱st .edition, Ayatollah Marʿashi Library, Qum, ۱۴۰۸/۱۹۸۸, p. ۲۸۸

۲- Revocable divorce is one after which a man has the right to go back to his wife up until the end of her ʿidda period and re-establish the marital bond. Since this type of divorce is characterized by a specific inconsistency, the woman enjoys all the rights she used to enjoy before divorce until the end of her ʿidda period; in the irrevocable divorce, however, the man does not have the right to return to his ex-wife, unless after her ʿidda period when he can marry her again observing all the marriage rules such as the woman's consent and payment of bridal gift. Naturally, during the ʿidda .period the woman does not enjoy any of the matrimonial rights

۳- Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, ۵/۱۳۴; ʿAllama Hilli, Qawaʿid al- .Ahkamʿ, ۳/۱۰۲; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۶۵۱

۴- Bahrani, Yusuf, Al-Hada'iq al-Nadhiraʿ, ۱۹/۹۳; Fadhil Hindi, Muhammad b. Hasan, .Kashf al-Litham, ۲/۱۰۶

۵- Shawkani, Muhammad b. ʿAli, Nayl al-Awtar, ۷/۱۳۸; Abi Dawud, Sunan ۱/۵۰۸, No. ۲۲۷۶; Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Khilaf, ۵/۱۳۴; Makki, Muhammad b. Mansur, .Al-Sara'ir, ۲/۶۵۱; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۳۷

۶- The existence of an obstacle is effective in lack of emergence of a ruling rather .than the lack of it to be effective in the existence of the ruling

.the mother's priority remains intact with her separation from her second husband

In addition, the mother's marriage makes her occupied with fulfilling her marital

duties and her second husband's rights, which are far more powerful than the right to custody; now, if the mother separates from her husband, that obstacle is removed (and she can undertake the custody of her child again.(۱

To our opinion, however, the mother's separation from her second husband does not restore her right to undertake her child's custody, since the restoration of the mother's right after its loss requires a reason. If we have doubt in the restoration of this right, the practical principle signifies the non-restoration of this right, just as in other instances the relinquished right will not be restored with the restoration of the .circumstances to the earlier state

Trustworthiness: Among the qualifications mentioned in legal texts for permitting .۵ (the mother to take the custody of her child is her trustworthiness.(۲

Mother's being trustworthy is interpreted from two aspects. Lack of sinful signs (depravity) in her, which is sometimes mentioned as justice(۳) or lack of perfidy and negligence in the issues related to the child's life,(۴) which seems to be more pertinent, since a mother may not be abiding by the moral instruction of the religion .but does not show the slightest negligence in taking care of her child

Although, for proving this condition such reasons as incompatibility with guardianship (wilayat), uncertainty of perfidy, creation of an atmosphere of learning bad habits for the child, and

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Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawaʿid wa al-Fawa'id fi al-Fiqh wa -۱ al-Usul wa al-ʿArabiyya, ۲/۴۰; Nadh al-Qawaʿid al-Fiqhiyya, p. ۹۵; Shahid Thani, Zayn .al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۵/۴۶۳; ʿAllama Hilli, Mukhtalaf al-Shiʿa, ۷/۳۱۰
Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۲۴; Sabziwari, - ۲ .Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴
For a definition of justice in Islamic Jurisprudence terminology and various - ۳ viewpoints about it see: Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۳۲۴; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۷; ʿAllama Hilli, Idhah al-Fawa'id, ۱/۱۴۹;

Ardabili, Mawla Ahmad, Majma' al-Fa'ida, ۱۲/۳۱۱; Al-Wasila ila Nail al-Fadhila, p. ۲۳۰; Makki, Muhammad b. Mansur, Al-Sara'ir, ۱/۲۸۰; Al-'Urwat al-Wuthqa, ۱/۱۰; Ansari, Kitab al-Tahara, ۲ vols. ۱st edition, Mu'assisa-yi Al-Hadi, Qum, ۱۴۱۵/۱۹۹۴, p. ۴۰۲; Tusi, .Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۸/۲۱۷; 'Al-Muqni'a, p. ۷۲۵

۴- Al-Wasila ila Nail al-Fadhila, p. ۲۸۸; Jaza'iri, Sayyid 'Abd Allah, Al-Tuhfat al-Saniyya, p.۲۹۶; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۹; Bahrani, Yusuf, Al-Hada'iq .al-Nadhira', ۲۵/۹۳

the appearance of distress and constriction have been referred to,(۱) to our opinion, the validity of the parents' having moral competence for undertaking the custody of their child does not require a specific reason, since the very legislation for custody is for protecting the life and psychophysical well-being of the children whose parents have separated by the ominous phenomenon of divorce.(۲) Now, how is it possible to leave the child with a parent who may inflict serious physical or moral damages upon ?that child

Is it logically permissible to transfer the children's custody to the parents (either father or mother) who misuse them as tools for earning money by sending them to street to engage in such acts as beggary, shoe shining, windshield cleaning, etc? Can it be claimed that the Holy Lawmaker would

?consent to such transference

Besides, if we regard the child custody and leaving it to either of the parents as a trust, the generalities that validate a person to be entrusted would be evidentiary in (the validity of this qualification in the issue of custody.(۳

۶. Unchanging of the Mother's Residence: Some of the Sunni jurists believe that in order to be able to take care of her child a mother should not change her residence, (whether temporarily or permanently (through traveling).(۴

To our opinion, although as Muhaqqiq Tusi and some other Shi'a jurists have asserted that the application of traditions on custody includes the two hypotheses of the mother's residence and change of residence, whose giving up is to

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۱- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham ila Tanqih Sharaʾiʿ al-Islam\, ۸/۴۲۴; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut fi fiqh al-Imamiyya, ۶/۴۰; ʿAmili, Sayyid Muhammad, Nihayat al-Maram fi Sharh-i Mukhtasar Sharaʾiʿ al-Islam, ۱/۴۶۹; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۷.

۲- Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۹.

۳- ʿAllama Hilli, Idhah al-Fawaʾid, ۳/۲۶۵; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۷.

۴- Al-Majmuʿ fi Sharh al-Muhadhdhab, ۱۸/۳۴۱; Sharbini, Muhammad, Mughni al-Muhtaj ila Maʿrifat Maʿani Alfaz al-Minhaj, ۴ vols. Dar Ihyaʾ al-Turath al-ʿArabi, Beirut, ۱۳۷۷/۱۹۵۸, ۳/۴۵۲; Badaʾiʿ al-Sanaʾiʿ fi Tartib al-Sharaʾiʿ, ۴/۴۵; Ibn Qudama, Al-Mughni,۹/۳۰۷.

be reasonable,(۱) it should be noted that the child is not merchandise in the hands of the father or mother who have the right to posses it; rather, it is entrusted to them to take care of during the time it is not able to manage its own life and to provide means for its growth. Therefore, during the time the child is living under the supervision of its mother or father, its interests must be taken into account.

Therefore, if the change of residence does not have a negative impact on the child's life trend, psychophysical health, education, and moral conduct, it will undoubtedly live with its mother given the (other) proofs hold true. But, if the change of residence is detrimental to it in any of the physical, psychological, emotional, religious, and educational aspects, this change will not be permissible. Nor will resorting to the absoluteness of traditions for its permissibility be possible, as certitude about the custody of either of the parents is true when the child's health is in all aspects secured.

۷. Unchanging of the Father's Residence: The Sunni jurists have made the child's custody by the mother conditional on the unchanging of the father's permanent or temporary (by travel) residence, in a way that if the father decides to change his place of residence, he can take the child away from the mother.(۲)

To our opinion, since there is no legal evidence for these issues in the traditions and Qur’anic verses,(۳) what is in the child's best

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۱- Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۶/۴۰; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۸/۴۲۵; Tusi, Abu Ja'far Muhammad b. Hasan, b. Al-Khilaf, ۵/۱۳۲, problem No. ۳۷; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۹; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۹.

۲ - Kashani, Abu Bakr b. Mas'ud, Bada’i' al-Sana’i' fi Tartib al-Shara’i', ۴/۴۵; Ibn Qudama, Al-Mughni,۹/۳۰۷; Al-Majmu' fi Sharh al-Muhadhdhab, ۱۸/۳۴۲; Ghazali, Al-Wajiz fi Tafsir al-Qur'an al-'Azim, ۲/۷۱; Jawahir al-'Uqudud, ۲/۱۹۰; also, see: Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۸/۴۲۵; Shahid Awwal, Muhammad b. Makki 'Amili, Al-Qawa'id wa al-Fawa’id, ۱/۳۹۶; 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۹; and for more information about other possibilities on this problem, see: Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۶/۴۰; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۷.

۳- Bahrani, Yusuf, Al-Hada’iq al-Nadhira', ۱۹/۹۴.

interests has to be taken into account. If being with the father or mother is to the child's interest, it would move along with them and if staying in its present residence were in his best interests, it would stay on.(۱)

۸. Unafflicted with Chronic and Contagious Diseases: We explained previously that the mother's insanity is a factor in disclaiming her competency in the custody of her child. Furthermore, some jurists have raised the question whether the mother's being afflicted with chronic and contagious diseases, as was the case for insanity, causes the loss of her competency or not.(۲)

By raising the issue, that a child's living with its sick mother will cause harm to it and by referring to the Prophet's words warning to keep a distance from those infected with leprosy and not watering a diseased camel from the same place as the healthy animals drink, some claim that such medical considerations in a religious context

prompt us to proclaim with certainty that a child must be separated from its sick mother.(۳)

In contrast, some also believe that the mother's affliction with chronic and contagious diseases would not cause the loss of her right to the custody of her child. Proving this, they have made reference to the tradition related by Nadhr b. Qirwash al-Jammal,(۴) as well as the traditions on custody and their non-reference to these diseases as restraining the mother's right to custody, the invalidity of mother's assistance and interference in the custody of her child and the practical

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۱- Sayyid Sabiq, Fiqh al-Sunna, ۲/۳۵۲.

۲- In early legal texts, given the knowledge of the time, mention has been made of such diseases as leprosy, scadies, anthrax, and plague (cholera); for more information, see: Jaza'iri, Sayyid ʻAbd Allah, Al-Tuhfat al-Saniyya, p.۲۹۶; Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Masalik al-Afham, ۸/۴۲۳ and ۴۲۵; ʻAmili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۹.

۳- Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۵۵۷, No. ۴۹۱۴ and ۴/۳۵۷; Ahmad, Musnad, ۲/۴۰۶; Bukhari, Abu ʻAbdullah Muhammad b. Ismaʻil, Sahih al-Bukhari, ۸ vol. Dar al-Fikr li al-Tibaʻat wa al-Nashr wa al-Towziʻ, ۱۴۰۱/۱۹۸۱ , ۷/۳۱; Muslim, Sahih, ۷/۳۱; Abi Dawud, Sunan ۲/۲۳۱, No. ۳۹۱۱; Bayhaqi, Ahmad b. Husayn, Sunan, ۷/۱۳۵; also see: Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Masalik al-Afham, ۸/۴۲۵; ʻAmili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۹; Shahid Awwal, Muhammad b. Makki ʻAmili, Al-Qawaʻid wa al-Fawa'id, ۱/۳۹۴; Damad, Muhammad Baqir, Al-Rawashih al-Samawiyya, Ayatollah Marʻshi Library, Qum, ۱۴۰۵/۱۹۸۵, p. ۱۶۵.

۴- Kulayni, Muhammad b. Yaʻqub, Al-Kafi, ۶/۴۰, No. ۱۳۴; Mazandarani, Mowla Muhammad Salih, Sharh-i Usul al-Kafi, with additional notes by Mirza Abulhasan Shaʻrani, ۱۲ vols. n.d., ۱۲/۲۵۹; Muslim, Sahih (Nawawi, Sahih Muslim bi Sharh al-Nawawi (Sharh-i Muslim), ۱۸ vols. Dar al-Kutub al-ʻArabiyya, Beirut, ۱۴۰۷/۱۹۸۷.) ۱/۳۵; Ghaffari, ʻAli Akbar, Dirasat fi ʻIlm al-Diraya (Summary of Miqbas al-Hidaya), ۱st edition, Imam Sadiq (A.S.) University, Tehran, ۱۳۶۹ sh. p.۴۹; Nasr, Sayyid Hasan, Nihayat al-Diraya,

ed. Majid al-Gharbawi, Mash'ar Publication, ۱۹۳۵/۱۹۷۵, pp. ۱۶۸-۱۶۹; Shahid Awwal, Muhammad b. Makki 'Amili, Al-Qawa'id wa al-Fawa'id, ۱/۳۹۷.

(principle of preference (istishab).(۱)

To our opinion, the contagious diseases have to be distinguished from the chronic ones. In the contagious diseases, so long as the mother has not recovered from her illness, the child may not be left in her care; in the chronic diseases, however, its effect on the mother's ability to take care of the child is to be taken into account.

If the mother is afflicted with certain chronic diseases such as different kinds of cancers, which do not hinder the mother from taking care of her child, her right to her child's custody is retained even though she receives help from others to this end. But if this disease is so serious that it does not allow the mother to fulfill her duty and someone else is to help out, there is no doubt that the child cannot be left with her since the narrations concerning custody are applicable where the mother is directly undertaking the duties of taking care of her child. In other words, the mother's right to custody is certainly valid when the mother is capable of fulfilling her duties so that the child's psychophysical health is not endangered.

Accordingly, it is not unlikely to claim that if the mother is addicted to narcotic drugs or alcoholic drinks, she is not qualified for her child's custody, although she is able to fulfill her duties, as its ethico-moral soundness, and in some cases its physical health, will be endangered. Thus, leaving the child with such a

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۱- 'Amili, Sayyid Muhammad, Nihayat al-Maram, ۱/۴۶۸; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۱۹۴; Bahrani, Yusuf, Al-Hada'iq al-Nadhira', ۲۵/۹۱; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, ۲/۱۶۲; Ruhani, Sayyid Muhammad Sadiq, Fiqh al-Sadiq, ۲۲/۳۰۷; Najafi, Muhammad Hasan, Jawahir, ۳۱/۲۸۸; Jaza'iri, Sayyid 'Abd Allah, Al-Tuhfat al-Saniyya, p.۲۹۶.

mother will cause the relinquishment of a purpose for which the law of custody has

.been devised

:In the end, it is necessary to consider some points

First: All the qualifications mentioned for custody, if we have reason for their validity, are not exclusive to the mother but common between her and the father, unless in regard to marriage, which, in case of validity, is only exclusive to the mother and is not (applied to the father.(١

Second: As, to our opinion, the mother's custody period includes the first seven years of the child's life, be it a boy or a girl, and after that the custody is transferred to the father up to the age of maturity, therefore, each of the parents is to observe these (terms during their custody period.(٢

Third: The qualifications explained above are related to custody; and the custody of a child and the related discourses are in effect only when the parents have been separated. Therefore, when they are living together they both undertake their child's care and in case of the incompetence of either one, the other takes the custody of the (child.(٣

Fourth: Given the fact that the child's infancy is part of the seven-year period that it spends with its mother, the qualifications for custody are true and necessary during the infancy, too; therefore, not asserting them for the infancy period is not because of (their invalidity, rather, because of the clarity of their validity.(۴

Loss of the Required Qualifications for Child Custody

If either of the parents, while holding the custody of his or

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.Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ٢/١۶٢ -١

.Jaza'iri, Sayyid ʿAbd Allah, Al-Tuhfat al-Saniyya, p. ٢٩۶ -٢

Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ٢/١٠۶; Najafi, Muhammad - ٣ .Hasan, Jawahir, ٣١/٢٨۴

.Idem, Jawahir, ۳۱/۲۸۹ -۴

?her child, loses any of the qualifications for this task, who will take over their duty

Loss of Mother's Qualifications: Some of the jurists believe that if the mother lacks .۱ or loses one of the qualifications required for the custody of her child, then the father will substitute her and undertake the duty of the child's custody.(۱)

Therefore, if the mother is qualified for taking care of her child but refuses to fulfill her duties for it, the father has to undertake care of his child even when the mother has the duty for that and if the father also refuses to do so, he can be forced to in order to protect the child.(۲)

In contrast, some also claim that in this case the maternal grandmother substitutes and fulfills her duties;(۳) naturally, if the grandmother is a successor to the mother, in case of the mother's absence or her refusal to undertake her child's custody, this duty .is transferred to her

To our opinion – as we also explained before – the child's custody is the father's main intrinsic duty that for special reasons is transferred to the mother for the first seven years of its life; then, if the mother cannot or does not want to fulfill this duty, the .father will substitute her

Loss of Father's Qualifications: However, if the father lacks or loses one of the .۲ required qualifications, the possibility has been set forth in some legal texts that the task of taking care of the child up to

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Idem, Jawahir, ۳۱/۲۹۵; ʻAllama Hilli, Tahrir al-Ahkam, ۲/۴۳-۴۴; Ibn Barraj Trablusi, - ۱ Qazi ʻAbd al-ʻAziz, Al-Muhadhdhab, ۲/۲۶۲ and ۳۵۲-۳۵۳; Tusi, Abu Jaʻfar Muhammad b. Hasan, Al-Khilaf, ۵/۱۳۱; ʻJamiʻ al-Khilaf wa al-Wifaq, p. ۵۱۰; ʻAllama Hilli, Qawaʻid al-Ahkam, ۳/۱۰۲.

.Shahid Awwal, Muhammad b. Makki ʻAmili, Al-Qawaʻid wa al-Fawa'id, ۱/۳۹۶ -۲

Ibn Barraj Trablusi, Qazi ʿAbd al-ʿAziz, Al-Muhadhdhab, ۲/۳۵۳; Fadhil Hindi, - ۳
.Muhammad b. Hasan, Kashf al-Litham, ۲/۱۰۶

(maturity is transferred to the mother.(۱

The proponents of this view believe that according to the traditions narrated by Fudhayl b. Yasar and Dawud Riqqi,(۲) if the father is a slave, so long as he is not set free, his child's custody will be left with the mother, even if she has been married to someone else. Accordingly, if other barriers to the father's custody of the child such as lack of moral competency, lack of intellectual soundness, and affliction with contagious diseases occur too, the mother, all the more so and in case of enjoying the required qualifications, has priority over other people in her child's custody. Besides the practical principle of continuance (istishab) also indicates the continuation of the (mother's right.(۳

To our opinion, however, during the time that the father is undertaking his child's custody, i.e., from seven until maturity, in case the father does not have the requirements for the child's custody or if he loses them, this duty will be transferred to the paternal grandfather. That is because with the termination of the mother's custody period, the duty of taking care of the child is transferred to the father or his (successor; and as we explained before, the paternal grandfather is the successor.(۴

Return of the Requirements

So far, we have stressed that custody of a child is subject to certain qualifications and if any of the parents loses one of them they will no longer be qualified to hold the custody of their child. However, it is natural to raise the

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Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۲۹; Najafi, Muhammad - ۱
.Hasan, Jawahir, ۳۱/۲۹۵
Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۲۷۵, No, ۱۳۰۴; Tusi, - ۲
.Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۱۰۷, No. ۳۶۱

Ibn Barraj Trablusi, Qazi ʽAbd al-ʽAziz, Al-Muhadhdhab, ٢/٢۶٢ and ٣۵٣; Makki, - ٣ Muhammad b. Mansur, Al-Sara’ir, ٢/۶۵٢; ʽAmili, Sayyid Muhammad, Nihayat al-Maram, ١/۴٧٠-۴٧١; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, ٨/۴٢٨; Muhaqqiq Hilli, Shara’iʽ al-Islam, ٢/۵۶٧; Hilli, Jaʽfar b. Hasan, Al-Mukhtasar al-Nafiʽ, p. ١٩۴; ʽAllama Hilli, Tahrir al-Ahkam, ٢/۴۴; ʽAllama Hilli, Qawaʽid al-Ahkamʽ, ٣/١٠٢; ʽAllama Hilli, Tabsirat al-Mutiʽallimin, p. ١٨٧; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, .٢/١٠۶; Bahrani, Yusuf, Al-Hada’iq al-Nadhira, ٢۴/٢١٠

.See: ʽAllama Hilli, Tahrir al-Ahkam, ٢/۴۴ -۴

question that if either of the parents regains the required qualifications for the child's ?custody, can the child be put under their care

If the father regains the required qualifications, his child's custody will undoubtedly be given back to him. The statement, "he is more deserved of his child than the mother due to his status as a father" in Fudhayl b. Yasar's tradition indicates that loss of qualifications is an obstruction to the father's status and it is obvious that if the .obstructions are removed, his fatherliness will restore its efficacy

Similarly, if the mother is also able to regain the required qualifications while holding the custody of her child, for example, when signs of insanity are removed from her, her contagious disease is treated, etc., she will regain her right to the custody of her child, for the expediency for custody is retained in her. Here, only an obstacle has barred its efficacy, which if removed, the expediency will be effective, except for the .marriage of the mother, which we have previously talked about

Parents' Relationship during the Child Custody

Among the most important issues brought up in child custody is the way the parents treat each other and the kind of relationship existing between them during this period, for as we explained before, child custody comes up when the parents have separated .through divorce

Naturally, when the parents are not living together under a single roof, the child has to live with one of them as according to the previous explanations the child, regardless

of gender, lives

with its mother during the first seven years of its life, and after that the father undertake its custody up to maturity.

It needs to be noted, however, that the parents' separation in itself creates tension between them, which may lead to hostile and vengeful behavior.

This unfriendly relationship between the parents would most often reach its peak by using the child as bait, that is, the child being with one parent is a means or pretext to exert indirect pressure on the other parent. For this reason, the great Shiʿa jurists have since long ago attempted by stating a definition of these relations to minimize the probable damage being inflicted upon any of the parents as well as the child.

During the period in which the child is living with its father, whether due to the mother's lack of qualification for the child's custody or because her legal time for this purpose has run out, the father must make arrangements for the child's relationship with its mother in a way that neither the child nor the mother may be kept at bay. To this end, the father has to prepare the ground for certain affairs to fulfill:(۱)

First, meeting with the child: He should prepare the ground for the meeting between the child and its mother. Moreover, not to prevent it, since preventing the child from meeting its mother would lead to breaking off the ties of relationship, which is strongly repulsive to Islam.

Second, nursing the child: If the child gets sick, the

۱- For further information, see: ʿAllama Hilli, Tahrir al-Ahkam, ۲/۴۴; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۲۶-۴۲۷; Sayyid Sabiq, Fiqh al-Sunna, ۲/۳۵۱.

father must not prevent the mother from nursing and treating the child and hold her

back from staying with her child, since the mother is more caring than others towards her child, and the sick child needs someone to take care of it and it is obvious that the .mother is the most deserving person for this task

Third, nursing the mother: When the mother gets sick, the father must not prevent .the child – whether her son or daughter – to visit their mother frequently

Fourth, child's mourning ceremony: In case the child passes away while the father is holding its custody, the mother can be present at her child's deathbed and attend to (the related tasks.(۱

Fifth, mother's mourning ceremony: And if the mother dies, her child can be present at her deathbed, and if old enough, the child can undertake to administer the burial services such as funeral ablution, enshrouding, funeral procession, and burial, .provided that the mother's husband gives them permission for this

As the researches indicate, nothing is mentioned in any of the Shiʿa legal texts about (the child's relationship with its father while living with its mother.(۲

To our opinion, taking care of the child by any of the parents cannot lead to the relinquishment of the mutual rights of the child and parents; thus, all the things that are conventionally regarded as the requirements and functions of the father-child or the mother-child relationships are permissible and the child or any of the parents cannot be deprived of

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It is to be noted that some jurists while emphasizing the mother's presence at her -۱ child's preparation for burial, enshrouding, and burial service, have stressed according to some traditions that the mother is not to attend her child's funeral procession, which from the viewpoint of the Shiʿi jurists is not true; see: Abi Dawud, Sunan ۲/۷۲, No. ۳۱۶۷; Qazvini, Muhammad b. Yazid, Sunan-i Ibn Majja, ed. Muhammad Fu'ad ʿAbd al-Baqi, ۲ vols. Dar al-Fikr, Beirut, n.d. ۱/۵۰۱, No. ۱۵۷۴-۱۵۷۸; Ahmad, Musnad, .۶/۴۰۸-۴۰۹; Hurr ʿAmili. Muhammad Hasan,Wasa'il al-Shiʿa, ۲/۸۱۷-۸۱۹

It is worth mentioning that in some Sunni legal texts there are phrases that include -٢ both the father and mother: "If either of the parents gets sick or dies and the child is with the other one, it would not prevent the child to visit him or her or attend his or her .funeral." Sayyid Sabiq, Fiqh al-Sunna, ٢/٣٥١

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(Part Three: A Study on the Legal Issues of Abandoned Children (Laqit

Preliminary Topics of Discourse

point

As one of the most important functions of marriage, reproduction sometimes turns .into a serious problem in both individual and social aspects

Many women and men in a legitimate or illegitimate way and through wanted or unwanted submission to sexual intercourse may provide the way for a baby to be born, whom none of them desired to live on and if it happens to be born, they cannot .manage its life due to certain social or economic problems

Such people can take action in two ways to get rid of this problem: destroying the fetus before birth (abortion), or abandoning the baby after birth, leading to formation .of the “abandoned children” phenomenon

Of course, the role of the natural factors in creating abandoned children is not to be ignored, since some natural disasters such as flood, earthquake, epidemic diseases, war, etc., may cause the death of the parents or even close relatives of the child. It is unfortunately in these circumstances that we encounter the tragic phenomenon of ."''unattended children

Besides the abandoned and unattended children, there is a third group of children called laboring children. These are a group of children who despite enjoying legal guardians and living with them, spend most of their time out of their homes or on the .streets in order to earn money for their guardians

Similarly important is the issue of the fourth group, i.e., "run-away children", since there are many children who because of poor family conditions leave home and wander about aimlessly, continuing

.to live in public places in much more unhealthy ways

Talking about the latter two groups, i.e., "laboring children" and "run-away children" is beyond the scope of this book, because taking care of the children who have identified protectors, legally rests with their guardians (wali) or people such as their father or grandfather. However, a study of the ways in which such children come into .being is to be undertaken as a social problem by sociologists

The jurists have independently studied the issue of the abandoned children in books of jurisprudence concerning luqata. Luqata means something that someone finds in (public places, whether it is property, animal, or human being.(١

Discussing about the found properties and animals and the way to introduce and find their proprietor is again beyond the scope of this book, but talking about the babies abandoned in public places, which in legal terminology are named by three words of .laqit, malqut, and manbudh,(٢) is what we deal with in this chapter

Of course, it is not to be neglected that many of the rulings set forth about the abandoned children are true for the unattended children too, namely the children who have for natural or social reasons lost their protectors. Thus, among the issues .brought up in this chapter, we will talk about both topics – as relevant to the subject

Laqit refers to any child who is abandoned to its fate, with no one to raise and take (care of it.(٣

It goes without saying that if the child is old

Faydh, ʿAli Ridha, Mabadi-yi Fiqh wa Usul, ۴th edition, Tehran University Publication, -۱ .۱۴۱۰/۱۹۹۰, p. ۳۳۸

These three words are used with the same meaning, but perhaps these names are -۲ applied to babies in their different states of being, because first they are abandoned in a public place, hence called manbudh, and then found by someone, thus called laqit. For more information, see: Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۶; .Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۳

ʿAmili, Shaykh Baha al-Din, Al-Jamiʿ al-ʿAbbasi, Farahani Publication, Tehran, n.d., -۳ p. ۲۵۱; it is to be noted that other definitions have also been given for laqit in legal texts as follows: Muhaqqiq Hilli, Shara'iʿ al-Islam, ۴/۷۹۹; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۴۰۶; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰; idem, Tahrir al-Ahkam, ۱/۲۴۷ and ۲/۱۲۳; idem, Idhah al-Fawa'id, ۲/۱۳۵; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, ۵/۲۴۹; ʿAmili al-Fuqʿani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Maʿrifat Sigh al-Niyyat wa al-Iqaʿat wa al-ʿUqud, ed. Muhammad Barakat, Maktibat al-Imam al-ʿAsr, Shiraz, ۱st edition, ۱۴۱۸/۱۹۹۷; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۳; Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. ۲۰۶; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۲۳۴; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۷/۶۶; Tabataba'i, Sayyid ʿAli, Riyadh .al-Masa'il, ۲/۳۲۳

enough to be able to satisfy its own needs and to take care of its own health, this title (laqit) does not apply to it, nor do the rulings that we will talk about in the following.(۱)

Now, if such a child has guardians, it will be handed over to them; otherwise, someone .should undertake its custody

It is also necessary to note that although the term laqit does not apply to the grown up people (adults) since they do not need to be taken care of (through custody), if their life is at risk, helping them and saving them from danger is obligatory to everyone.(۲)

Necessity of Taking Care of the Unattended Children

If we encounter a child in the streets or a public place who does not have a guardian

or whose legal guardian has abandoned and this child is wandering about with no ?shelter, what should we do

There are three views in the legal texts concerning the duty of the people who :encounter such children

Most of the Shiʿa jurists believe that collecting the abandoned and unattended children and taking care of them is a collective or communal (kifa'i) duty, i.e., if one person undertakes it, others will be exempt from this task. However, if no one does, all those who are informed about it while having the possibility to take care of such (children, are sinful.(۳

Collecting the abandoned children and taking care of them is obligatory, since it is among the benevolent deeds that God has obliged us to cooperate with one another and commissioned us to act

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۱- Although laqit does not solely apply to babies (infants), it includes all the children in various age groups. However, the question has been raised in legal texts as to whether or not this title includes the discerning children (mumayyiz) and the adolescents who have approached maturity (marahiq), as well. For more information, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۸/۴۶۲; Ardabili, Mawla Ahmad, Majmaʿ al-Fa'ida, ۱/۳۹۳-۳۹۴; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, ۶/۹۷.

۲- See: ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰.

۳- ʿAllama Hilli, Irshad al-Adhhan, ۲/۴۴۱; ʿAllama Hilli, Tahrir al-Ahkam, ۱/۲۴۷ and ۲/۱۲۳; ʿAllama Hilli, Tabsirat al-Mutiʿallimin, p. ۱۴۲; ʿAmili al-Fuqʿani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Maʿrifat Sigh al-Niyyat wa al-Iqaʿat wa al-ʿUqud, ed. Muhammad Barakat, Maktibat al-Imam al-ʿAsr, Shiraz, ۱st edition, ۱۴۱۸/۱۹۹۷; Al-Jamiʿ li al-Shara'iʿ, p. ۳۵۶.

in this respect, as saving one's life is also among the most important duties of every Muslim: (Cooperate in piety and God wariness, but do not cooperate in sin and aggression.),(۱) (O you who have faith! Bow down and prostrate yourselves, and

worship your Lord, and do good, so that you may be felicitous.)(۲), (And whoever saves a life is as though he had saved all mankind.)(۳)

In addition, if giving food to someone who is starving or keeping people clear of harm is obligatory from a religious perspective, it can be well concluded that collecting the unattended and abandoned children, sheltering them, and fulfilling their needs is obligatory in sight of God.(۴)

Given these explanations, although collecting children from public places is obligatory, it is indeed a communal duty, because collecting such children is aimed at protecting their lives and fostering and educating them. This goal is achievable by any Muslim who may undertake it; besides, the jurists' consensus (ijmaʽ) and reference to the practical principle of disavowal (bara'a) would confirm it not to be ʽayni (personal duty) and to be kifa'i (collective or communal duty).(۵)

The question arises for the jurists who believe collecting the abandoned and unattended children is a communal duty that if someone undertakes this task, can they give up later on or are they obliged to live up to their commitment until the child reaches maturity?

Answering this question involves the doctrinal rather than jurisprudential (legal) research that whether the undertaking that has been communal at the outset

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۱- Q. ۵: ۲.

۲- Q. ۲۲: ۷۷.

۳- Q. ۵: ۳۲.

۴- For more information on how to refer to these issues as evidence as well as the criticism on them, see: Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Durus, ۳/۷۶; Tusi, Abu Jaʽfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۶; Tabataba'i, Sayyid ʽAli, Riyadh al-Masa'il, ۲/۳۲۳-۳۲۴; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, ۱۲/۴۷۱; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Rawdhat al-Bihiyya, ۷/۷۷; Ardabili, Mawla Ahmad, Majmaʽ al-Fa'ida, ۱۰/۴۰۹.

.'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰ -۵

can turn into personal so that it is not possible to give it up, or it will remain as a (communal duty to be continued.(۱

In contrast to communal obligation, some jurists believe that picking up abandoned children and taking care of them is a praiseworthy and preferably religious act, in .which lies otherworldly reward besides its worldly value

To prove this view, in addition to practical principle of exemption which results in non-obligation of collecting such children, it is emphasized that cooperation in pious deeds which is implied from the verse (Cooperate in piety and God wariness, but do not (cooperate in sin and aggression)(۲) is desirable and not obligatory.(۳

To our opinion, there is no doubt that collecting such children and sheltering them is among the good and pious acts which have always been recommended, (and We revealed to them the performance of good deeds)(۴), doing this pious act sometimes .become essential and obligatory, since failing to do so may endanger a child's life

Thus, collecting the abandoned children and taking their custody is a desirable (mustahab) act, which will turn into an obligation when their lives are endangered. (This obligation can be communal or individual given the child's conditions.(۵

In any case, whether picking up and collecting such children is desirable or obligatory, the finder of the child (multaqit) is to do their best in safeguarding it in a decent way and fulfill their commitment toward that child either directly or indirectly through someone else, so long as they have not dispensed

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This issue has been examined in two books: first, Kitab-i Jihad (Siyar), explaining -۱ the difference between learning sciences and making jihad despite the fact that both are communal duties; second: the Kitab-i Luqata explaining what we are currently discussing. See: 'Allama Hilli, Tadhkirat al-Fuqaha, ۱/۴۰۸ and ۲/۲۷۱; idem, Idhah al-

.Fawa'id, ۱۱/۱۲۳ and ۳۸/۱۷۵

.Q. ۵: ۲ -۲

Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۸۰۰; Ibn Fahd Hilli, Al-Muhadhdhab al-Bari', ۴/۲۹۷; -۳ Khwansari, Sayyid Ahmad, Jami' al-Madarik, ۵/۲۴۹; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya,'۷/۷۷; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۱۲/۴۷۲.

.Q. ۲۱: ۷۳ -۴

Ardabili, Mawla Ahmad, Majma' al-Fa'ida, ۱۰/۴۰۹; Sabziwari, Muhammad Baqir b. -۵ Mu'min, Kifayat al-Ahkam, p. ۲۳۴; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, ۲/۳۲۴.

with their decision. Naturally, whenever in the meantime they failed to continue or by any reason were unwilling to continue this task, they are to leave the child with the judge (Islamic ruler or supportive institutions).(۱)

Permit Requirement (Asking for Permission): Although special requirements are to be fulfilled for custody of a child which we will deal with later on, collecting the children from the streets or any other public places does not require anyone's consent.(۲) However, in case of lacking financial, moral, and social qualifications in the finder, the child is taken back from him; for, asking permission from the judge or the Islamic ruler can lead to wasting time and further damage to the child.

Producing a Witness: If someone encounters an infant or child abandoned in a public place, do they need a witness for picking it up from the public passageways? Naturally, if a witness is supposed to bear witness on picking up the child by the finder, they should point out two things:

۱. Finding the child by the finder (multaqit),

۲. The properties and things possibly found along with the child.

It is related from some Shafi'i jurists that the presence of a witness when picking the abandoned child (laqit) is obligatory, because such children must remain secure both in terms of life and parentage and this will not be realized except by taking a witness statement.(۳)

With reference to the principle of exemption and comparing picking up abandoned children to accepting trusts, some jurists have claimed that

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۱ - - Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۶; ʿAmili (Shahid idem, Al-Rawdhat al-Bihiyya, ۷/۷۵; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۱; idem, Idhah al-Fawa'id, ۲/۱۳۹.

۲- Ibid, ۲/۱۴۰; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, ۷/۱۳۹..

۳- See: ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰.

taking a witness – like when accepting trusts – is not obligatory, and it is possible to proceed to collect them without anyone to be present as witness.(۱)

A group of jurists also believe that if the finder of the child (multaqit) is a just person, there is no need for taking a witness; however, if his or her justice is not evident, taking witness is obligatory, as this would create more trust in that person.(۲)

Finally, this possibility is also brought up in legal texts that taking a witness for picking up an abandoned child is a desirable action (mustahab). It can be a factor in preserving the child's parentage (lineage) and preventing any possible misuse by the person who has found the child. It is possible to increase the possibility of finding the child's parents.(۳)

To our opinion, although the presence of a witness for collecting and taking custody of abandoned and unattended children is desirable as reason dictates that someone should witnesses the one picking up the child. Especially when there are personal belongings with that child so that the finder would not get into trouble later on by being accused and suspected by others, this is not obligatory or mustahab in a legal sense since we have no valid reason for it. Besides, finding a witness for such a matter is sometimes impossible and it may at times be so time-consuming that the child's life could be endangered, especially in large cities where due to unfamiliarity with each other,

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۱ - Idem, Tahrir al-Ahkam, ۱/۲۴۷ and ۲/۱۲۳; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۱۲/۴۷۳; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۷/۷۸; Muhaqqiq Hilli, Shara'iʿ al-Islam, ۴/۸۰۱.

۲ - ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۶۲۷.

۳ - Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. ۲۰۶; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۶.

people would usually not agree to witness.

Conditions for the Custody of Abandoned Children

Jurists have set certain conditions to be fulfilled by the person who has found a child and wants to undertake its custody. If they do not meet all or any of the conditions, they are not allowed to undertake this task and in case they have picked up the child, it is taken back from them and left with someone qualified.

It is to be noted that these conditions are valid only for the finder that for whom the finding of the child is a preliminary step toward protecting and safeguarding it, or else, they are not required for the finder who does not have the intention or the ability to undertake such a task. Therefore, the term multaqit in the Islamic jurisprudence does not apply to any person who finds a child.

۱. Maturity and Intellect: Maturity and intellect are among the general requirements of any obligation; that is why some jurists instead of mentioning those requirements have pointed out that the first requirement for permission to take the custody of a child is maturity of age. Thus, all the reasons that validate maturity and intellect in other obligations would include iltiqat (picking up abandoned babies from public passageways) as well.(۱)

In addition to this, only he can manage someone else's life who can at least manage his own life; naturally, the one who is not qualified to manage his own life will not be able to run someone else's life.

Given this, it is obvious

۱- Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۷۹۹; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, ۳/۷۵; 'Amili al-Fuq'ani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Ma'rifat Sigh al-Niyyat wa al-Iqa'at wa al-'Uqud, ed. Muhammad Barakat, Maktibat al-Imam al-'Asr, Shiraz, ۱st edition, ۱۴۱۸/۱۹۹۷; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, ۷/۶۹; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۴۰۶; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰..

that for validation of these two conditions, there is no need for relating the discussion of custody to the issue of guardianship (wilaya),(۱) for we have no reason for the validity of guardianship in the sense set forth in Shi'a jurisprudence regarding the issue of hidhanat and iltiqat.

۲. Mental Maturity: Mental maturity (rushd) is opposite to feeble-mindedness (safah), as mentally mature (rashid) is opposite to feeble-minded (safih). The feeble-minded individual who is referred to as inconsistent and simpleton, is the one who is unable to use their properties rightly and handle them wisely. In contrast, the mentally mature is someone who is capable of making correct use and preventing damage of his or her properties.(۲)

With reference to this issue, the Holy Qur'an states: (Do not give the feeble-minded your property, which Allah has assigned you to manage: provide for them out of it, and clothe them, and speak to them honorable words. Test the orphans when they reach the age of marriage. Then if you discern in them maturity, deliver to them their property.)(۳)

It is noteworthy that the designation of orphan does not do anything with mental maturity (rushd) and the ruling ensued, for although the object of verse ۶ of Surat al-Nisa and the two traditions narrated by Hisham and 'Abd Allah b. Sanan(۴) is orphan, but as verse ۵ of the same sura denotes the ruling for not delivering property to the feeble-minded is a general ruling that includes both orphan and non-orphan. Then,

reaching the age

Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ١٢/۴۶۴; Riyadh al-Masa'il, -١ ٢/٣٢٣; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, fi Sharh al-Mukhtasar al-Nafiʿ, ed. ʿAli Akbar Ghaffari, ٧ vols, ٢nd edition, Tehran, Saduq Publication, ١٣٩٧/١٩٧٧, ۵/٢۵١.

See: Fathullah, Dr. Ahmad, Muʿjam-i Alfadh al-Fiqh al-Jaʿfari, p. ٢٢٩; Qalʿaji, - ٢ Muhammad, Muʿjam Lughat al-Fuqaha, ٢nd edition, Dar al-Nafaʿis, Riyadh, ١۴٠٨/١٩٨٨, p. ٢٢٢ and ٢۴۵; Abu Habib Saʿdi, Al-Qamus al-Fiqhi, ٢nd edition, Dar al-Fikr, Damascus, ١۴٠٨/١٩٨٨.

Q. ٢: ۵-۶ -٣.

Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ٧/۶٨, No. ٢; Tusi, Muhammad b. Hasan, - ۴ Tahdhib al-Ahkam, ٩/١٨٢, No. ٧٣١.

of maturity is not sufficient for taking hold of one's property; one has to achieve a mental maturity for this purpose, as well.(١)

Although we have no reasons in hadith collections that explicitly proclaim a person does not need custody when they reach mental maturity, this does not mean that the immature person can do anything except property ownership, since conditionality of such matters as maturity in religious rulings and regulations are not legal and founded; rather, they are exhortative and emphasized according to intellectual stipulation and procedure.

Thus if according to the intellectuals maturity is necessary in other matters except property ownership, it can be judged to be conditional; although legal reasons are silent about it.

Examination of the families whose decisions are intellectually oriented clearly indicates that the newly matured adolescents who enjoy inadequate wisdom cannot be left to themselves to manage their own lives. Rather, they need to be taken care of, a care that needs no specific reason issued by the legislator to prove its necessity, but the intellectuals' practical prescription is sufficient for this purpose.

Therefore, included among those who are in need of custody are the feeble-minded and intellectually underprivileged people who do not enjoy the required mental health .and maturity to run their own lives

It goes without saying that even if the feeble-minded reach their maturity, they have to remain under protection of their guardians; thus, they will not be able to undertake (running another person's life.(۲

Conclusion: If what is meant by iltiqat is picking up a

Shahid Awwal, Muhammad b. Makki ʽAmili, Al-Qawaʽid wa al-Fawa'id, ۲/۴۱ and ۱۷۳; -۱ Miqdad Siyuri Nadhd al-Qawaʽid al-Fiqhiyya, p. ۹۱ and ۳۲۱; Maraghi, Mir ʽAbd al-Fattah, Al-ʽAnawin al-Fiqhiyya, ۲ vols. ۱st edition, Nashr-i Islami Publication, Qum, .۱۴۱۷/۱۹۹۷, ۲/۶۸۵-۶۸۶ and ۷۳۸

Although with these explanations there is no need for criticizing and reviewing the -۲ views and arguments of the proponents and opponents of the veracity of iltiqat (picking up abandoned babies from public passageways) by the feeble-minded, there are two contrasting views in legal texts for the validity and invalidity of mental maturity. For more information of the reasons of each of these viewpoints and their criticism, see: Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Durus, ۳/۷۶; Karaki, ʽAli b. Husayn, Jamiʽ al-Maqasid, ۶/۱۰۹; Tabataba'i, Sayyid ʽAli, Riyadh al-Masa'il, ۲/۳۲۳; Ardabili, Mawla Ahmad, Majmaʽ al-Fa'ida, ۱۰/۴۰۲; Wahid Bihbahani, Muhammad Baqir, Hashiya Majmaʽ al-Fa'ida wa al-Burhan, ۱st edition, ʽAllama Wahid Bihbahani Institute, ۱۴۱۷/۱۹۹۶p. ۵۸۳; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, .۱۲/۴۶۵; ʽAllama Hilli, Idhah al-Fawa'id, ۲/۱۳۸; ʽAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۱

baby from the street and handing it over to the unattended-children care centers, a feeble-minded person will be able to do this. However, if it means undertaking the responsibility for taking care of the baby, we should note that only he could take care of a child who is at least able to take care of his own life, and the feeble-minded person does not enjoy this ability. And the fact that according to the Holy Qur'an

leaving the properties of an orphan at his or her own disposal is, besides maturity, contingent on mental maturity does not mean that the feeble-minded require a guardian only in financial matters and can undertake their own life affairs in non-financial matters as well.

For this reasons, claiming that a child's custody can be entrusted to a feeble-minded person but not letting him or her to interfere with the child's financial affairs,(١) is not legally justified.

٣. Justice: In some jurisprudential texts, enjoyment of justice is regarded as one of the requirements of the finder of the above-mentioned child.

The word justice (ʻidalat) is conceptually opposite to tyranny (zulm = injustice), but in legal texts its opposite is iniquity (fisq), although some have regarded it as higher than not committing sins and defined it as a kind of perpetual self-restraining (innate disposition).(٢)

If we translate justice as not committing sins, then being just equals not being sinful or reprobate (fasiq). but if we translate it as innate quality and moral disposition, then not being sinful cannot be

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١- Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Al-Rawdhat al-Bihiyya, ٧/٧٠.

٢- For more information, see: ʻAllama Hilli, Idhah al-Fawa'id, ١/١۴٩; Ardabili, Mawla Ahmad, Majmaʻ al-Fa'ida, ١٢/٣١١; Al-Wasila ila Nail al-Fadhila, p. ٢٣٠; Makki, Muhammad b. Mansur, Al-Sara'ir, ١/٢٨٠; Naraqi, Ahmad, Mustanad al-Shiʻa fi Ahkam al-Shariʻa, ١٩ vols. ١st edition, Al al-Bayt Institute, Mashhad, ١۴١۵/١٩٩۵. ١٨/٧۴; Al-ʻUrwat al-Wuthqa, ١/١٠; Ansari, Kitab al-Tahara, p. ۴٠٢.

regarded as equivalent to being just, as there is a third state to them that although a person does not have the habit of self-restrain, he or she does not commit any sins in some instances, either.(١)

Some jurists have regarded as precautionary the existence of justice in the finder of the child(۲); some believe that justice is not valid because child custody is not safekeeping to require justice and if it does, being a Muslim by itself encompasses being trustworthy, as well. Besides, permitting a non-Muslim person to undertake the custody of a Muslim child, the practical principle of exemption, and inclusiveness of traditions indicate the invalidity of justice, too.(۳)

Finally, the possibility has also been proposed that if a child has some properties of his own, the one who proceeds to pick up the child has to be just, since the breach of trust is strongly probable; but if the child lacks properties, justice is not valid.(۴)

Irrespective of the third theory, which is not evidenced by any proof, the other two theories can be reconciled, since although leaving the child with someone who has a disposition of justice is precautionary; there is no reason for observing it. Moreover, some proofs can be given according to which we do not need to make sure of such a level of piety. Since, sometimes we can trust someone who, despite lack of certain desirable features, is certainly able to protect the child by paying enough affection and care in managing its affairs to

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۱- Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, ۸/۴۲۴.

۲- Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Rawdhat al-Bihiyya, ۷/۷۳.

۳- ʽAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Durus, ۳/۷۵; Ardabili, Mawla Ahmad, Majmaʽ al-Fa'ida, ۱۰/۴۰۰.

۴- Karaki, ʽAli b. Husayn, Jamiʽ al-Maqasid, ۶/۱۰۸.

the extent that a just person may not enjoy such ability. However, it does not mean that we can leave a child with a reprobate (fasiq) person.(۱)

To our opinion – as we already said in the discussion about the custody of parents – enjoyment of moral competence of the finder of the child (multaqit) is among the most fundamental requirements of leaving the child's custody to them. Since the legitimacy of iltiqat in Islamic jurisprudence is for its protection of the life and

psychophysical health of the children whose parents have for some reasons shunned their duty in undertaking their care and abandoned them in public passageways. Now, how would it be possible to leave the child with someone who would inflict serious ?physical or moral damages on it

Is it reasonable to give the child's custody to someone who due to moral corruption and lack of sufficient religious commitments would misuse them in various ways, or at ?least provide the ground for sins in them

Thus, if the finder of the child is a reprobate (fasiq) person or happen to become so later on, the Islamic ruler (the judge of the institutions in charge) would take over the child from him or her, since the fasiq is not legally trustworthy. Fasiq is a wrongdoer (zalim), and trusting their wrongdoing is not permissible according to the holy verse: (And do not incline toward the wrongdoers, lest the Fire should touch you),(۲) as it can (lead to the miseducation of the child.(۳

But

.Ardabili, Mawla Ahmad, Majmaʿ al-Fa'ida, ۱۰/۴۰۲ -۱

.Q. ۱۱: ۱۱۳ -۲

Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۸; ʿAllama Hilli, Qawaʿid al- -۳ Ahkam, ۲/۲۰۱; ʿAllama Hilli, Tahrir al-Ahkam, ۱/۱۲۳; Muhaqqiq Hilli, Shara'iʿ al-Islam, .۴/۸۰۰

if the finder's state is unclear or only apparently seems trustworthy, although in some legal texts it is considered permissible to give the child's custody to them,(۱) to our opinion , so long as we are not reassured that the child's physical and moral soundness is taken care of, we cannot leave the child with them. To prove such a claim we do not need any particular reason, since the attitude and procedure of the intellectuals, which is undoubtedly confirmed by the Holy Lawmaker (the Prophet – .S.A.W.), is that not everyone should be trusted with the education of one's child

How would a religion that does not deem it permissible to leave a child with a wet nurse who is familially, ideologically, or intellectually unhealthy and regards it as inappropriate to leave one's property to a thoughtless person, would allow it to leave a child to someone who we know does not have the required competence, or at least we do not know whether he has it or not?(۲)

Can we not hold the words of Imam al-Baqir (A.S.) as a model to follow, who said: "Whoever trusts an untrustworthy person there is no proof for them with God"? In addition, should we not take heed of the message that the Imam would always impart by saying: "A trustworthy person never betrays you, but that you have trusted a betrayer [to be betrayed]."(۳)

Perhaps it has been for the importance of the issue of the unattended children that some jurists have

p: ۹۶

۱- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۶; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۱; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, ۶/۱۰۸; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۴۰۶.

۲- Hurr ʿAmili, Muhammad Hasan, Wasa'il al-Shiʿa, ۱۵/۱۸۴-۱۸۸ and ۶/۲۳۰-۲۳۴.

۳- Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۵/۲۹۹, No. ۳-۴.

distinguished between luqata and laqit and emphasized giving the custody of such children to a non-reprobate person, while casting doubt on the necessity of entrusting property to a non-probate person, because there are no supportive procedures to prevent misuse of children like the ones existing concerning the prevention of misuse of property by untrustworthy people. Similarly, some jurists deem it necessary for achieving more reassurance to take someone as witness over a person who finds an abandoned child, even though the finder is a trustworthy person.(۱)

۴. Islam: Being a Muslim is among the requirements stipulated in some legal texts for the finder (multaqit) of the abandoned child.

The question has been raised by the Shiʿa jurists as to whether a non-Muslim can pick up an abandoned Muslim child from the streets and undertake its custody. Besides, ?can a non-Muslim undertake to manage the life of a Muslim child

Some believe that only a Muslim is allowed to collect and take care of unattended children, since a non-Muslim may provide the ground for the deviation of the child by (influencing its beliefs and faith.(۲

In contrast, some also believe that being a Muslim is not a condition for such a task, because two basic goals legitimize the collection of the abandoned children: fulfilling the child's basic and natural needs and providing for its educational requirements, both of which can be afforded by a non-Muslim person, too. Furthermore, the application of the proofs for iltiqat encompasses the two hypotheses of the multaqit (finder of the

p: ۹۷

۱- ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۸.

۲- Wahid Bihbahani, Hashiya Majmaʿ al-Fa'ida, p. ۵۸۲.

abandoned child) as being a Muslim or non-Muslim. If we are doubtful about the permission of leaving the child's custody to a non-Muslim, we should know that the practical principle of exemption denotes its permission, whether the child is a Muslim (or a non-Muslim.(۱

A third view is also brought up in legal texts and its followers believe that even though a non-Muslim cannot take care of a Muslim child, they can take care of a non-Muslim child.

It is emphasized that custody is a kind of guardianship (wilaya) and the non-Muslim cannot have guardianship over a Muslim according to the verse (and Allah will never provide the faithless any way [to prevail] over the faithful.)(۲) So the non-Muslim cannot take care of a Muslim child. In addition to that, the non-Muslim can have a

great impact on a child's tendency toward a doctrine other than Islam, as the same has also been brought up concerning the marriage of a Muslim woman to a non-Muslim man.(۳)

A non-Muslim can undertake to pick up and hold the custody of a non-Muslim child because the guardianship of a non-Muslim over a non-Muslim is permissible and there is no obstacle to undertake such a task. When a child is non-Muslim, there is no such issue of negative impact on the child's beliefs; and if we doubt about the permissibility of this task, the exemption principle signifies its permissibility.(۴)

Since the critical review of each of these reasons would lengthen the discussion, we suffice it to say

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۱- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۵; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۳۲۴; Ibn Fahd Hilli, Ibn Fahd Hilli, Al-Muhadhdhab al-Bariʿ, ۴/۲۹۷ and ۲۹۵; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۴۰۶.

۲- Q. ۴: ۱۴۱.

۳- See: Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۵/۳۴۸, No. ۱ and ۳۵۱, No. ۱۵۶; Tamimi, Nuʿman b. Muhammad, Daʿa'im al-Islam, ۲/۱۹۹, No. ۷۳۲; Ibn Babuwayh Qummi, ʿIlal al-Shara'iʿ, ۲ vols. Maktabat Haydariyya, ۱۳۸۶/۱۹۶۶. ۲/۵۰۳, No. ۱; Rawandi, Fadhlullah, al-Nawadir, ed. Saʿid Ridha ʿAli ʿAskari, ۱st edition, Dar al-Hadith, ۱۴۰۷/۱۹۸۷.

۴- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۵; ʿAmili al-Fuqʿani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Maʿrifat Sigh al-Niyyat wa al-Iqaʿat wa al-ʿUqud, ed. Muhammad Barakat, Maktibat al-Imam al-ʿAsr, Shiraz, ۱st edition, ۱۴۱۸/۱۹۹۷; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۰; ʿAllama Hilli, Tahrir al-Ahkam, ۲/۱۲۳; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ۷/۷۲; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۱۲/۴۶۶-۴۶۷; Khu'i, Kitab al-Nikah, ۲/۳۱۱; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, ۵/۲۵۱ and ۴/۴۷۶; Ibn Fahd Hilli, Ibn Fahd Hilli, Al-Muhadhdhab al-Bariʿ, ۴/۲۹۵; Ardabili, Mawla Ahmad, Majmaʿ al-Fa'ida, ۱۰/۳۹۸; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. ۲۳۴.

that to our opinion Islam is the main requirement for collecting and undertaking the

:custody of abandoned and unattended children, because

There is not the slightest doubt in that a non-Muslim can fulfill the material and psychological needs of an unattended child as much as, or sometimes even better than, a Muslim can, for the non-Muslims are well-capable of this responsibility for their own children. However, it has to be noted that satisfying the children's physical and emotional needs alone for taking care of them is not enough, for living with one or more persons by itself provides a suitable ground for compliance and modeling, a .context that has a great and undeniable impact on the child's behavior and beliefs

The Holy Prophet (S.A.W.) of Islam has described this impressionability as follows: "No child is born except according to its inner nature [Islam]; then, it is its parents who rear it as a Jew, a Christian, or a Magus."(۱) Accordingly, it can be well understood that trying to preserve the Monotheistic inner nature and preventing it from deviation is (not only decent and praiseworthy but an indisputable task for any Muslim, as well.(۲

With this consideration in mind, there remains no room for dividing children into Muslim and non-Muslim. That is because the title "non-Muslim" is applied to the child who is found in non-Muslim settlements, otherwise, such a child has neither reached a mature age to have selected a specific religion out of his/her own investigation, nor he/she has specific parents so

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.Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۲/۴۹, No. ۱۶۶۸ -۱
Karaki, 'Ali b. Husayn, Jami' al-Maqasid, ۶/۱۰۲; Wahid Bihbahani, Hashiya Majma' -۲ .al-Fa'ida, p. ۵۸۲

.that the title Jewish-born or Christian-born, etc., is true for him/her

Thus, if we find a child in such a circumstance and can leave it with a Muslim, the latter is more preferable to a non-Muslim. However, if we find a Jewish-born or Christian-born child abandoned in the street who lacks a guardian in all aspects, then it is not clear whether its being a Christian-born is a license for leaving its custody to the

.church

It goes without saying that this matter does not contradict the right of non-Muslim parents in taking care of their own child, for our discussion concerns a situation in which undertaking the guardianship of a child is a legislative matter and requires passing a law by the legislator. However, every parent naturally undertakes their child's life simply by fulfillment of generic relation between them and their child without needing any conventional right; and it is obvious that in generic matters it is the external fulfillment of an action that is functional rather than the conventional .matters such as acceptance of a specific religion

Therefore, like the Muslim parents, the non-Muslim parents can undertake their own child's care and nothing can deny them this generic right. However, this right can be restricted to specific limitations and conditioned on special conditions when it is .entrusted to someone through passing a law so that not all people can exploit it

Financial Capacity: Should the finder of an abandoned or unattended child (multaqit) .۵ enjoy financial capacity besides other requirements, to be

p: ۱۰۰

?able to take the custody of the child

Answering this question is possible when it is clarified how the expenses for the child .would be provided during the time the finder undertakes its care

Undoubtedly, paying for the expenses of the child's care is not upon the finder. Rather, if the child owns property, the expenses will be paid thereby, but if the child does not have such property, the Islamic state (public treasury) is responsible for paying for the expenses and in case of the government's non-existence or inability to pay for it, provision of expenses will be upon the well-to-do class or the public. Thus, (in all these assumptions, the finder's financial capacity cannot be a condition.(۱

However, if we assume that the provision of the child's expenses is not possible by any of the above means, the finder of the child is obliged to pay for the expenses by

him/herself. It is natural that in such circumstances the finder's financial capacity is the basic requirement for accepting the responsibility of the unattended child's .custody

Anyhow, the financial capacity of the child's finder can be an advantage for them for in this case they can provide more welfare for the child, which in turn can have a significant role in its growth. Thus, it is not unlikely to claim that in equal circumstances (the one who is more well-to-do has priority in undertaking the child's care.(۲

Residence Constancy: Does the permanent or temporary change of residence of .۶ the person who takes care

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'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۱; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al- -۱ .Durus, ۳/۷۶

.Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۵/۲۲۴ -۲

?of an unattended or abandoned child have any impact on the child's care process

Some argue that the finder of the child is regarded as its guardian, has the right to make decisions for the child, and is allowed to move their residence along with the child to avoid harming it; furthermore, the practical principle of exemption does (confirm the permissibility of the move.(۱

In contrast, arguing that the child's distancing from the place it was abandoned will in itself reduce the chance for finding its probable relatives, some believe that moving the child's residence is not permissible and the finder is permitted to hold its custody (so long as they do not move it from that place to another.(۲

Finally, some have also commented on this issue considering the finder's moral .characteristic as well as the type of the place that the child is moved onto

On this basis, if the finder of the child is a really trustworthy and just person, he is entitled to take the child with them, but if they are apparently trustworthy and just,

they do not have the right to move the child away since there is the possibility of misuse.(٣)

In some legal text, the issue of moving the child in relation to the type of place that it is supposed to be moved onto is examined, such as move from town to desert, town to village, from town to town, and finally, the nomadic life.

It is noteworthy here that most of these matters have been brought

p: ١٠٢

١- Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, ٧/١٢٩ and ٦/١١١.
٢- ʿAllama Hilli, Idhah al-Fawa'id, ٢/١٣٩.
٣- Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ٣/٧٦; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ٣/٣٤٥; ʿAllama Hilli, Tadhkirat al-Fuqaha, ٢/٢٧١.

up by Muhaqqiq Tusi and ʿAllama Hilli, with the legal judgments (fatawa) of the Sunni scholars playing a significant role in their formation.(١)

To our opinion, none of the stated reasons can prove or disprove the permissibility of transfer or move of the child in general. What is of importance to us is the child's interests. It is to be noted whether the child's move is helpful in its physical and mental growth or not. If the answer is yes, this move is permissible; otherwise, it is not. In order to become more assured of this, the realization of its helpfulness and the way it should be carried out can be left upon the organization that is in charge of control and care of the families who take the custody of such children.

It is not unlikely, of course, that like the late Shahid (Awwal), we give a legal judgment (fatwa) that the child had better not be taken from a city to a village and from a village to the desert, so that its living condition does not worsen, its kinship bonds remain more preserved, and its physical health care can be pursued more easily.(٢)

٧. Gender: Among the questions asked about the finder of the child is the impact of their gender; is it necessary for the finder to be a man? Or can a woman also take the

?abandoned child's custody simply by finding it

ʿAllama Hilli claims that although affection is stronger in women, the men's physical superiority and their

p: ۱۰۳

Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۰-۳۴۱; ʿAllama Hilli, Tadhkirat -۱ .al-Fuqaha, ۲/۲۷۱-۲۷۲; Muhaqqiq Hilli, Sharaʾiʿ al-Islam, ۴/۸۰۰

.Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۷ -۲

higher strength makes them more reliable to be entrusted with a child's custody. Ahmad Ardabili, known as Muhaqqiq, also claims that if the child is a girl, a woman has priority over a man in undertaking her custody, because women are kinder and are (more mentally prepared to take care of a child.(۱

To our mind, there is no gender advantage in taking care of the child as what is .important is the benefit and interests that the child receives

Legal Issues of Abandoned Children

point

Legal issues of the unattended children are examinable from two perspectives; one is identifying the proprietor and the degree of proprietorship of the property found along with the children and the other is provision of the expenses for their care and .determining the required sources for that purpose

Property Found along with the Abandoned Children

The children who are abandoned in one of the public places usually have some ?objects with them. Who do these objects legally belong to

Although there is disagreement among the jurists concerning the proprietorship of some of the objects, there is no doubt that since the child, like adults, is entitled to (take possession of objects, it has ownership over what it has dominance over.(۲

The objects used by the abandoned child such as the clothes it is wearing, the blanket covering it, the cloth wrapped around it, etc., are undoubtedly among the child's belongings.(٣)

There are two different opinions concerning the proprietorship of the objects found around the abandoned child; some regard them as belonging to the child and some believe that they do not belong

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١- 'Allama Hilli, Tadhkirat al-Fuqaha, ٢/٢٧١; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, ١٠/۴٢٩.

٢- Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ١٢/۴٧٢.

٣- Muhaqqiq Hilli, Shara'i' al-Islam, ۴/٨٠٠; Al-Jami' li al-Shara'i', p. ٣۵۶; 'Allama Hilli, Irshad al-Adhhan, ١/۴۴١.

to the child.(١)

If some objects are hidden under or around the place where the child is abandoned, can one by finding those objects judge them as the child's belongings?

Some believe that if these objects are buried in a piece of land that belongs to the child, the buried objects belong to the child as well; otherwise, their simply being buried around the child does not necessarily mean they belong to it.(٢)

But if there is a written note with the child indicating that a specific property belongs to this child, can this note be trusted and accordingly judged to the child's proprietorship of the belonging?

By accepting the note as an indication of proprietorship, some judge the property as belonging to the child; and some, by doubting it to be an indication, judge it as not belonging to the child.(٣)

To our opinion, the belongings used by the child or found with it are undoubtedly regarded as its properties, such as the clothes it is wearing, garments somehow

relating to it (bedcover, sheet, blanket, mattress, and the like); ornaments that are with the child, and the stuff around it (such as hammock, baby carriage, and the like), (and generally all the things that are customarily said to belong to a child.(۴

However, what are found around the child do not belong to it, unless there exists valid and reliable evidence as to the child's ownership of them or they are in a place (dedicated to the child.(۵

Providing for the Abandoned Children's Living Expenses

Among the most important issues concerning the

Al-Jami' li al-Shara'i', p. ۳۵۷; 'Allama Hilli, Idhah al-Fawa'id, ۲/۱۳۹; Shahid Thani, -۱ Zayn al-Din b. 'Ali 'Amili, Al-Durus, ۳/۷۴; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, ۷/۷۷-۷۸; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, .۱۲/۴۷۳

'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۲; also, for information about the Sunnis's -۲ view in this regard see: Ibn Babuwayh Qummi, Al-Muqni, , ۶/۴۰۹; Al-Sharh al-Kabir, .۶/۴۰۷

Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, ۳/۷۴; 'Allama Hilli, Tadhkirat al- -۳ Fuqaha, ۲/۲۷۲; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۱۲/۴۷۳; 'Allama .Hilli, Idhah al-Fawa'id, ۲/۱۴۰

'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۲; Shahid Awwal, Muhammad b. Makki 'Amili, -۴ .Al-Lum'at al-Damishqiyya, p. ۲۰۶

Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۸۰۱; Al-Jami' li al-Shara'i', p. ۳۵۶; Ardabili, Mawla -۵ .Ahmad, Majma' al-Fa'ida, ۱/۴۲۲

.abandoned (unattended) children is the provision of their living expenses

The question is raised by most of the jurists as to who would commit to provide for .the child's living expenses once its custody is taken by the person who has found it

In case the child has sufficient financial means, provision of its living expenses, like

other people, is not obligatory on anyone else and its material needs are fulfilled through its own assets.(1)

Although the jurists are unanimous about this ruling in and by itself, they disagree concerning how it is to be implemented; for, the jurists have raised the question as to whether the finder of the child is permitted to directly take from the child's property and use it to provide for the living expenses of the child or they require permission from certain authorities (Islamic judge) for taking from the child's property.(2)

Some believe that the finder of the child can without needing to ask permission from any authority such as the orphan's guardian, use the child's property to provide for its living expenses.(3)

In contrast, most of the Shiʿa jurists believe that the finder of the child cannot undertake to use the child's property to provide for its living expenses without asking from the Islamic ruler.

Accordingly, if the Islamic ruler is present and one can ask permission from him for this purpose, the finder of the child can provide for the child's expenses using its own property, since education, custody, and infaq (giving away in charity) require a kind

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1- Tusi, Abu Jaʿfar Muhammad b. Hasan Al-Mabsut, ۳/۳۳۸; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۲.

2- It is to be remembered that the child's properties are divisible into two types: ۱. the properties that belong to the child because of its being a foundling (laqit), like what is endowed to the unattended children or someone has stated in their will for this purpose, ۲. the properties that the child is a private proprietor of, such as clothes, blanket, jewelry, cash money, hammock, tent, and the like. For more information, see: ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۲; idem, Tahrir al-Ahkam, ۲/۱۲۴.

3- ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۳; Ardabili, Mawla Ahmad, Majmaʿ al-Faʾida, ۱۰/۴۱۷-۴۱۸.

of guardianship which is among the responsibilities of the father, grandfather, the

executor (wasi), and the Islamic ruler. Besides, usufruct (tasarruf) is possible only by having general or specific guardianship, whereas the finder of the child (multaqit) does not enjoy any of these two types of guardianship.

Therefore, if the finder appropriates the child's property except in necessary cases without permission from the Islamic ruler, they will stand responsible for it proportionate to the amount they have appropriated and they are obliged to refund it.(۱)

In this case the Islamic ruler can give permission to the finder to spend from the child's property, as he can also leave the child's property to a trusted person and specify certain amount of the property for the child's expenses.(۲)

But if the Islamic ruler does not exist or access to him is not possible, the finder can use the child's property to provide for its expenses as hisba (accountability).(۳)

To our opinion, if we scrutinize the arguments of both proponents of the independence and non-independence of the child's finder (multaqit), we would find out that the core of their discussion is the existence or non-existence of the multaqit's guardianship over the abandoned child ; however, we explained at the outset of the discussion that custody (hidhanat) means taking care of the child and that guardianship in the concept used in jurisprudence has nothing to do with its actualization or veracity.

It is clear that if the issue of guardianship is no longer under consideration, no room is

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۱- ʿAllama Hilli, Irshad al-Adhhan, ۱/۴۴۱; idem, Tahrir al-Ahkam, ۲/۱۲۳; idem, Idhah al-Fawa’id, ۲/۱۴۰; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid; ۶/۱۱۲; Sabziwari, Muhammad Baqir b. Mu’min, Kifayat al-Ahkam, p. ۲۳۵; Tabataba’i, Sayyid ʿAli, Riyadh al-Masa’il, ۲/۳۲۵.

۲- Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۸-۳۳۹; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۳.

Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۱۲/۴۷۴; Muhaqqiq Hilli, - ۳ Shara'i' al-Islam, ۴/۸۰۱; Hilli, Yahya b. Sa'id, Al-Jami' li al-Shara'i', Sayyid al-Shuhada .Publication, Qum. ۱۴۰۵/۱۹۸۵, p. ۳۵۶; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, ۸/۲۶۰

left for discussion about asking permission from the Islamic ruler and the like; thus, for the same reason that the finder of the child is permitted to undertake the custody of the child, they are also permitted to appropriate the child's property to actualize the .custody

The point that is to be taken into consideration is the trustworthiness of the finder of the child, as we already explained that taking the custody of a child is the acceptance of a kind of trust and safekeeping a trust requires some qualification, without which it .is not possible to accept the trust

Thus, if the finder of the child is trustworthy and thereby permissible to adopt the .child, then there is no difference between the child and its property

If the finder is trustworthy, the issue of their surety (dhamam) is no longer an option unless they have not correctly fulfilled their duties (by going to extremes), in which case they will definitely stand accountable whether they have appropriated the child's .property by the Islamic ruler's permission or without it

It is also to be noted that as confirmation of the finder's trustworthiness requires being done by an authority that is in charge of this task, confirmation of correct and pertinent expenditure of the child's property by the finder also requires a supervisory system to prevent the finder from probable shortcomings (going to extremes) and .care be taken that the child's interests are in all cases secured

It is obvious that the realization of such a matter

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does not necessarily require asking permission from the Islamic ruler if the ruler is meant to be an Infallible Imam or his special deputy,(۱) let alone that the title of ruler includes the jurist (general deputy) and other than him; for, we have no reason for its

validity except for the prophetic tradition that says: "Sultan is guardian of the one who does not have a guardian"(۲) which, given the studies done, is a part of a tradition that 'A'isha has narrated from the Holy Prophet (S.A.W.) concerning a woman's getting married without permission of her guardian.(۳)

Despite the debates of the Sunnis themselves over the chain of transmission (sanad) and the non-acceptance of its content by the Shi'a jurists, this tradition has been first related by 'Allama Hilli during jurisprudential discussions and without mentioning its sanad.(۴)

In addition to this, although some have claimed that what is meant in this tradition by Sultan is the Infallible Imam or his specific and general deputies and for the same reason they have resorted to it to prove the guardianship of jurisprudence (wilayat-i faqih),(۵) to our opinion what is meant by Sultan is the Infallible Imam or his specific deputy and inclusion of others such as the Shi'a jurist during the occultation age requires another reason that may regard the jurists as deputies of the Infallible Imams in all issues.(۶)

Therefore, there is no reason for the necessity of asking permission from the Islamic ruler (the jurist during the occultation age) to spend from the

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۱- Not needing to ask permission from an Infallible Imam does not mean disclaiming guardianship, because the Infallible Imams, following the Holy Prophet of Islam (S. A.W.), have innate superiority as well as generic and legislative guardianship. For an example, we can refer to the traditions concerning the divorce of the insane. See: Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۶/۱۲۵, No. ۱-۲; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۷۵, No. ۲۵۳.

۲- Ibn Tamimi, Ahmad b. 'Ali, Musnad Abi Ya'la Musili, ed. Husayn Salim Hasan, ۱۳ vols. Dar al-Ma'mun li al-Turath, n.d.

۳- Suyuti, Jalal al-Din, Al-Jami' al-Saqir fi Ahadith al-Bashir al-Nadhir, ۲ vols. ۱st edition, Dar al-Fikr, Beirut, ۱۴۰۱/۱۹۸۱, ۱/۴۵۷, No. ۲۹۶۳۰; Abi Dawud, Sunan, ۱/۴۶۲, No. ۲۰۸۳;

Dar Qutni, ʿAli b. ʿUmar, Sunan Dar Qutni, ۴ vols. ۱st edition, Dar al-Kutub al-ʿIlmiyya, Beirut, ۱۴۱۷/۱۹۹۶, ۳/۱۵۸; Ibn Tamimi, Musnad Abi Yaʿla Musili, ۸/۱۹۱, No. ۴۷۴۹.

۴- Ziʿali, Jamal al-Din, Nasb al-Rayat al-Ahadith al-Hidaya, ۶ vols. ۱st edition, Dar al-Hadith, Cairo, ۱۴۱۵/۱۹۹۵., ۳/۳۶۲; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۷.

۵- Ibid., ۲/۵۹۲; Najafi, Muhammad Hasan, Jawahir, ۲۸/۴۳۰; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, ۲/۱۵; Naraqi, Ahmad, Mustanad al-Shiʿa fi Ahkam al-Shariʿa, ۱۶/۱۴۳; Naraqi, Ahmad, ʿAwa'id al-Ayyam fi Qawaʿid al-Ahkam wa Muhimmat Masa'il al-Halal wa al-Haram, ۳rd edition, Qum, Basirati Library, ۱۴۰۸/۱۹۸۷, p. ۲۰۰; Tabataba'i, Sayyid ʿAli, Riyadh al-Masa'il, ۲/۸۱.

۶- Ansari, Shaykh Murtadha, Kitab al-Nikah, Baqiri Publication, Qum, ۱۴۱۵/۱۹۹۵, p. ۱۵۲; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, ۴/۱۶۵.

child's properties, and if we are doubtful of the necessity to ask permission from the Islamic ruler (faqih), the principle of exemption (bara'a) proves it unnecessary;(۱) although caution demands to ask permission for this purpose from the jurist or the supervisory organizations that have been established to this end.

Since most of the unattended children who are abandoned in public places have no properties or money with them so that their livelihood is thereby taken care of, the question has been raised by our jurists as to how the living expenses of such children is to be provided.

A group of the Shiʿa jurists have set forth the possibility – which is somehow influenced by the Sunni views – that the living expenses of such children are to be provided and paid by the public treasury,(۲) as there is no doubt that such a task is in the interest of the public; and since the assets of such people would be transferred to the public treasury after their death in case they have no blood relatives or relatives by marriage, the government is obliged to provide for their living costs now that they are in need of help.(۳)

Naturally, if the state's public budget does not respond to the living expenses of such children or there are more important expenses for the government to cover, then the people are required to provide for these expenses as collective obligation.

Such public collaboration can be carried out in two forms of loan or alms, which in

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۱- Khwansari, Sayyid Ahmad, Jami' al-Madarik, ۲۲/۲۹۳.
۲- Hilli, Yahya b. Sa'id, Al-Jami' li al-Shara'i', p. ۳۵۷; 'Allama Hilli, Tahrir al-Ahkam, ۱/۱۲۳.
۳- Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۹; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۲.

the first form; the child should pay back its previous living expenses after reaching maturity and earning a livelihood. Bu as for the second form, it does not have to pay back the expenses.(۱)

In contrast, some jurists have suggested that the government has no duty in paying for the living expenses of such children and their expenses have to be provided for through non-governmental sources.(۲) To this end, three ways have been suggested: granting a loan; using the budget at the disposal of the Imam; and provision by the one who is taking care of the child (multaqit).

Apart from the option of granting loan, which has no legal foundation, raising the issue of the budget at the disposal of the Imam is based on the notion that we consider a specific budget for the Infallible Imam (A.S.) other than the public treasury, as he is the heir to the people who have no heir and as he receives certain share of the khums (one fifth tax); but the Imam's treasury seems to be no different from the public treasury, but this dichotomy is resulting from the fact that after the demise of the Holy Prophet (S.A.W.) some illegally took over the rule and prevented the Infallible Imams from involving in running the state's affairs.(۳)

Similarly, obliging the person who is taking care of the abandoned child (multaqit) to provide for its living expenses does not sound right, because, in order to undertake the provision of other people's living expenses there must

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1- Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, ٣/٧٤; Karaki, 'Ali b. Husayn, Jami' al-Maqasid, ٦/١١٥ and ١١٧; 'Amili (Shahid Thani), Zayn al-Din b. 'Ali, Masalik al-Afham, ١٢/٤٦٧; 'Amili (Shahid Thani), Zayn al-Din b. 'Ali, Al-Rawdhat al-Bihiyya, ٧/٧٥.

2- 'Allama Hilli, Tadhkirat al-Fuqaha, ٢/٢٧٢.

3- Khwansari, Sayyid Ahmad, Jami' al-Madarik, ٥/٢٥٣; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ٤/٧٠ and ٦/٢٥; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, ٤/٥, issue ١, and ٤/٢٢, issue ١٤٥, and ٤/٢٣, issue ١٥, and ٥/٢٠٩, issue ٨٧; 'Allama Hilli, Mukhtalaf al-Shi'a, ٦/١٠٦; Makki, Muhammad b. Mansur, Al-Sara'ir, ٣/٢٧٢ and ٣٣٧; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ١٣/٤٠; Najafi, Muhammad Hasan, Jawahir, ٣٨/١٣٩ and ٣٩/٤٤; 'Amili al-Fuq'ani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Ma'rifat Sigh al-Niyyat wa al-Iqa'at wa al-'Uqud, ed. Muhammad Barakat, Maktibat al-Imam al-'Asr, Shiraz, 1st edition, ١٤١٨/١٩٩٧.

exist a kinship bond or marital relation between them, which are characterized in tradition texts as father, mother, spouse, and children, none of which applies to an abandoned child whom someone has found in public places.

Besides, compelling the finder of the child to pay for its living expenses causes reluctance in people to collect abandoned children because this will double their commitment, i.e., both undertaking the child's custody (hidhanat) and providing for its living expenses (nafaqa).

It is obvious that with the increase of responsibility, people's participation in such tasks will decrease, which in turn would lead to inflicting harm on such children and in case we suspect obligatoriness of infaq on the finder of the child, we can repudiate its probable obligatoriness by implementing the practical principle of legal exemption.(1)

To our opinion, in order to determine whose duty it is to pay for the living expenses of abandoned (unattended) children, we should see what motivation lies behind picking up (iltiqat) the child from the public passageways.

If the motivation behind picking up abandoned children is merely protecting their health and after picking up they will be handed over to the police centers or establishments dedicated to this purpose (e.g., orphanage), the duty of providing for

their living expenses rests with the Islamic state and no one else has any commitment in this respect, irrespective of the child being a Muslim or a non-Muslim.(۲)

However, if the finders of the child have undertaken the child's custody and adopted it as their

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۱- 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۱-۲۷۲; idem, Tahrir al-Ahkam, ۲/۱۲۳; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, ۱۰/۴۱۶; Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۱۰۵, No. ۳۴۲۴; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Istibsar fi Makhtalafa min al-Akhbar, ed. Sayyid Hasan al-Khirsan, ۴ vols. ۴th edition, Dar al-Kutub al-Islamiyya, Tehran, ۱۴۰۵/۱۹۸۵ ; Ibn Babuwayh Qummi, 'Ilal al-Shara'i', ۲/۳۷۱, No. ۱; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۶/۲۹۳, No. ۸۱۵.

۲- Al-Muqni'a, p. ۶۴۸; Tusi, Muhammad b. al-Hasan Al-Nihaya, p.۳۲۲; Ibn Barraj Trablusi, Qazi 'Abd al-'Aziz, Al-Muhadhdhab, ۲/۵۶۹; Al-Wasila ila Nail al-Fadhila, p. ۲۷۷; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۱۰۷; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۶.

stepchild with the coordination of the supervisory establishments – as explained during previous discussions – then providing for the living expenses of that child would be upon the finders; for if not logically, but normally and conventionally it is upon them to provide for the living expenses of the child they have agreed to adopt.(۱)

For this reason, when someone picks up a child from the streets or takes it over from the center for collecting these children in order to adopt it as a stepchild, they implicitly accept all exigencies and consequences of such an undertaking, which include providing for the food, clothing, hygiene, and medical treatment as well as the education and marriage of that child, just like any father and mother who normally undertake such tasks for their children in ordinary circumstances, without having any right to refund their expenses in the future.(۲)

The exception is that, since accepting the responsibility of taking care of a child is a primitive commitment and the finder of the child can, depending on their ability or

willingness, refuse to accept some of the exigencies and consequences, they restrict fulfilling their responsibility to a specific time or task, in which case they are obliged to fulfill their commitment proportionate to the extent of their responsibility.

In this case, the finder can accept only the supportive aspects of custody provided that the child's expenses are undertaken by someone else; or, supposing that the finder is paying the expenses too, they may reserve the right

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۱ - Perhaps it is for this consideration that the jurists have claimed that custody demands infaq (giving away in charity); for more information, see: Karaki, 'Ali b. Husayn, Jami' al-Maqasid, ۶/۱۰۹.

۲ - Ardabili, Mawla Ahmad, Majma' al-Fa'ida, ۱۰/۴۲۰; Makki, Muhammad b. Mansur, Al-Sara'ir, ۲/۱۰۷.

to refund it after the child reaches maturity and is able to pay back those expenses.(۱)

In any case, to prove the permissibility of refunding the expenses of taking care of the child in this latter presumption (intention of recourse), we can rely on the traditions related by 'Azrami, Mada'ini, Muthanna, and Muhammad b. Ahmad.(۲)

Disagreement in Expenses for the Custody of Abandoned Children

If we suppose that we cannot supply for the expenses of such children through any governmental or non-governmental sources and the finder of the child is ready to undertake to pay for these expenses provided that they are refunded, then it is argued that if the abandoned child, after achieving financial means and ability to pay back what the finder had spent for it, disagrees with the finder over the amount of refund, what has to be done to resolve the disagreement?

The disagreement of the finder and the found is to be viewed in two ways:

First, disagreement over the expenditure itself: If the finder of the child (multaqit) claims to have spent a sum of money for its livelihood but the abandoned child (laqit)

denies such expenses, the claims of the finder is accepted, since it is obvious that the child's growth would not have been possible without expenditure, whether this disagreement is over the spending from the child's own property or from the finder's property.(۳)

Second, disagreement over the amount of expenditure: If the amount of money that the finder reports to have spent for the child is not accepted by the found (laqit) but this amount

p: ۱۱۴

۱- Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۸۰۰; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, ۲/۴۰۷; 'Allama Hilli, Irshad al-Adhhan, ۱/۴۴۱; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۹; Khwansari, Sayyid Ahmad, Jami' al-Madarik, ۵/۲۵۰.

۲- Kulayni, Muhammad b. Ya'qub, Al-Kafi, ۵/۲۲۵, No. ۳-۴; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۷/۷۸, No. ۳۳۷; Ibn Babuwayh Qummi, Man la Yahdhuruhu al-Faqih, ۳/۱۴۵, No. ۳۵۳۲.

۳- Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۸۰۲; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۳.

is equivalent to the conventional expenditure of taking care of a child, then the finder's report will be accepted because it is assumed that since the finder of the child has been a trustworthy person, the child's custody has been entrusted to him or her; thus his claim in this respect is accepted.(۱)

However, if the finder demands an amount higher than the conventional or claims to have spent from the child's own property and the child, after reaching maturity, disclaims that amount of expenditure, the child's claim is accepted, because the finder of the child himself admits having gone to excess and the practical principle necessitates the child (laqit)'s non-commitment (non-indebtedness) to the expenditure excessive to the convention.(۲)

To our opinion, since entrusting a child's custody to its finder has to be supervised by the Islamic state, the supervisory institution would monitor the way the living expenses of the child are provided for, just as it keeps under its surveillance the

.finder's moral soundness and the child's psychophysical health

Therefore, if the finder of the child, who also undertakes the child's custody, is an honest and trustworthy person and the supervisory institution would approve his actions as right, then his claiming as to the amount of the child's living expenses will be accepted, whether supplied from the child's properties or from his own; otherwise, the child's finder has to present trustworthy documents to prove his claim. Of course, it is obvious that the child's claiming no expenses have been paid for its

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۱ - ʻAllama Hilli, Irshad al-Adhhan, ۱/۴۴۱; Tusi, Abu Jaʻfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۹; Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Masalik al-Afham, ۱۲/۴۸۷.

۲ - Karaki, ʻAli b. Husayn, Jamiʻ al-Maqasid, ۶/۱۱۷; Tusi, Abu Jaʻfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۳۹; Muhaqqiq Hilli, Shara'iʻ al-Islam, ۴/۸۰۳; ʻAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۳; also, for more views see: Al-Jamiʻ li al-Shara'iʻ, p. ۳۵۷; Shahid Thani, Zayn al-Din b. ʻAli ʻAmili, Al-Durus, ۳/۷۷.

maintenance is triable only when there has been another source for providing its .living expenses

Penal Problems of Abandoned Children

point

Penal problems of the abandoned (unattended) children are examinable from two :perspectives

Crime against Abandoned Children

Among the problems discussed in Islamic jurisprudence is the crime against the .abandoned (unattended) children and the examination of its penal and legal aspects

This discussion is brought up since in Islamic law physical injuries to other people are divided into two parts of deliberate and erroneous, depending on the perpetrator's intention. In deliberate crimes, the one who is the victim of a crime (mujanna ʻalay)

and in case of death, his or her inheritors have the right to inflict the same criminal act (qisas) with the same degree and intensity on the criminal (jani), or receive damages (diya) in case it is done mistakenly and without premeditation, depending on the .intensity and the place of injury

As for the crime against children, if the child has a natural guardian (father or paternal grandfather), its guardian can, depending on the type of crime and the observance of his or the child's expedience, retaliate by qisas, receive diya, or forgive the criminal without receiving money or by receiving money as much as he deems appropriate. In case the criminal act results in the murder of the child, he can ask for qisas or be .content with receiving diya

The question is raised by the jurists that if a child does not have a guardian, who will ?make decisions on the above cases

We will examine the juridical and penal aspects

of this issue in regard to the type of the crime and the punishment in the following :four forms

First, deliberate crime leading to death: If someone kills a human being on purpose and with criminal premeditation, his/her inheritor or inheritors (blood avengers) can punish and kill the murderer in retaliation (qisas) on the conditions explained in legal :books

Do not kill a soul [whose life] Allah has made inviolable, except with due cause, and( )(whoever is killed wrongfully, We have certainly given his heir an authority(۱

Now, if someone killed an abandoned (unattended child), whose responsibility would it be to make decision about qisas or forgiveness of the criminal? And in case of ?forgiveness, who would the money taken thereby belong to

Some jurists believe that making decision in this respect rests with the Infallible Imam

(A.S.), who can have the criminal killed through qisas as he can forgive him and receive the blood money, which he will spend on what is in the Muslims' interests.(2)

(But if one is granted any extenuation by his brother, let the follow up [for the blood-money] be honorable, and let the payment to him be with kindness. That is a remission from your Lord and a mercy.)(3)

A group of jurists also believe that the Imam (A.S.) is the successor to the inheritor and to the guardian of the murdered person and like the guardian can forgive the murderer by receiving some money; or forgive him without receiving any money; so, the Infallible Imam (A.S.) has the

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١- Q. ١٧: ٣٣.

٢- Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ٣/٣۴۶.

٣- Q. ٢: ١٧٨.

right to show Islamic affection to the murderer without receiving any money.(1)

Muhaqqiq Hilli and some of the Shafi'i jurists believe that the Imam can – like in other instances – only punish the murderer in qisas, because forgiveness of the criminal is contrary to the Muslim's interest.(2)

Second, erroneous crime leading to death: If someone causes another's death in a non-criminal act and without predetermination (erroneous murder), he has to pay blood money.(3) Therefore, the one who causes the death of abandoned (unattended) children has to pay the blood money; and according to the Sunni jurists this blood money is to be deposited to the public treasury, and according to the Shi'a jurists it is handed over to the Infallible Imam (A.S.) to spend it wherever he deems necessary.(4)

Third, premeditated crime leading to bodily retaliation (qisas on the body): if someone by means of a criminal act causes maiming, fracture, rupture, and the like to a person's body, they have to be retaliated (by qisas), unless the one to whom the crime

.has been inflicted consents to forgive without compensation or with compensation

Now, what should be done if someone inflicts such a crime on an abandoned ?(unattended) child

Some jurists maintain that since making decision in this respect is left with the very person who had been the victim of the crime, we must wait for the child to reach maturity so that he or she may decide accordingly, since one of the purposes of qisas is to pacify the anger of

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۱- Al-Jami' li al-Shara'i', p. ۳۵۸; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۶; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, ۳/۸۰.

۲- Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۸۰۱; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۷.

۳- It is to be noted that in the erroneous murder the criminal's paternal kinsmen ('aqila) would pay the blood money; see: Al-Jami' li al-Shara'i', p. ۳۵۸.

۴- Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۸۰۱; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۶; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۶.

the person who has been the victim of a crime and this purpose is fulfilled through .qisas or receiving blood money by the blood avenger

Therefore, as the father cannot retaliate or forgive the criminal before his child reaches maturity, so also is the Imam (A.S.) not permitted to do so, either.(۱)

Since such a view requires imprisonment of the criminal until the child reaches maturity and there is no permit for imprisonment which in itself is an independent punishment, this view has been criticized.(۲)

Muhaqqiq Tusi believes that if a child has reason and power of discrimination, we must wait for the child to reach maturity, since it is the child's right to wish to revenge. However, if the child is feeble-minded and insolvent (mu'sir), his or her guardian shall take blood money instead of retaliation (qisas); and if the child is well-to-do (mawsir),

(blood money cannot be received for him/her.(٣)

The reason for this distinction is the difference made between the child and the insane concerning qisas in legal texts. According to some jurists, a guardian (wali) can make decision about crime against an insane person, but he is not permitted to do so in relation to a child; he has to wait for the child to reach maturity. It is because the length of time to wait for the child to reach maturity is specified, but this time is not distinct for the insane person, as it is not clear when he/she would recover his/her (mental health.(٤)

It is also mentioned in

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Al-Jami' li al-Shara'i', p. ٣٥٨; 'Allama Hilli, Idhah al-Fawa'id, ٢/١۴٣; Karaki, 'Ali b. - ١ .Husayn, Jami' al-Maqasid, ۴/١٢۶; Muhaqqiq Hilli, Shara'i' al-Islam, ۴/٨٠١-٨٠٢

.Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ١٢/۴٧٩ -٢

.Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ٣/٣۴۶ -٣

.'Allama Hilli, Idhah al-Fawa'id, ٢/١۴٣ -۴

legal texts that since the Infallible Imam is the guardian (wali) of the unattended children and the guardian can ask for qisas on behalf of the one over whom he practices wilaya (muwalla 'alayh), the Imam or his deputy can retaliate the criminal in qisas in the best interest of the child or forgive him in lieu of diya. There is no reason postponing this for the child to reach maturity, especially when this postponement (may remove the conditions for qisas or receiving diya.(١)

Fourth, erroneous or deliberate crime not leading to bodily retaliation (qisas on the body): If someone does something unintentionally resulting in damaging another's body or deliberately inflict an injury on another person whose retaliation (qisas) is not .possible, he/she has to pay diya for this infliction

As for crime against a child, this diya shall go to the child's guardian, and as the abandoned (unattended) child's guardian is the Infallible Imam (A.S.), he shall receive

(the diya for the crime against the child.(٢)

It is to be noted that in all these four instances performing qisas or receiving diya for the deliberate or erroneous crime, if in the best interest of the child, rests with the Imam (A.S.). However, the finder or the person who takes care of the child (multaqit) does not have any rights and cannot make any decision in this respect, since they (have no guardianship over the child.(٣)

Abandoned Children's Offenses

Among the most important issues, concerning the abandoned (unattended) children is the offenses committed by them and the

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١- Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, ۶/١٢۴; Ardabili, Mawla Ahmad, Majmaʿ al-Fa'ida, ١٠/۴٢٣; ʿAllama Hilli, Tadhkirat al-Fuqaha, ٢/٢٧٧; idem, Tahrir al-Ahkam, ٢/١٢۴; idem, Irshad al-Adhhan, ١/۴۴١; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ٧/٧٩; idem, Masalik al-Afham,١٢/۴٧٨.

٢- Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ٣/٣۴۶; ʿAllama Hilli, Tadhkirat al-Fuqaha, ٢/٢٧۶.

٣- Muhaqqiq Hilli, Shara'iʿ al-Islam, ۴/٨٠٢.

legal and penal responsibilities that ensue.

Although this issue is not restricted to the abandoned (unattended) children and includes all children, since someone must undertake their responsibility, the issue becomes doubly important.

First, erroneous offenses: If the child erroneously commits an offense that entails diya as punishment, such as murder, beating, and injuring, its paternal kinsmen (ʿaqila) are obliged to undertake to pay off.

Since what is meant by "paternal kinsmen" is the father as well as the mature, wise, and wealthy men among the paternal relatives of an individual,(١) and there exist no

such people for the abandoned (unattended) children, thus someone has to substitute .for the child's paternal kinsmen

According to the Sunnis an unattended child's ʿaqila is the government; however, to the Shiʿa jurists it is the Infallible Imam (A.S.)(۲), unless when the Infallible Imam is .also in charge of the state, then the government would undertake such a duty

Second, deliberate offenses: If committing an offense is after the child reaches maturity, then he will be punished in qisas like other people and in case of the victim's .consent, he may pay diya

But, if the child commits an offense before reaching maturity, since the child's deliberate offense amounts to mere erroneous offense, paying diya is upon its ʿaqila, (i.e., the Infallible Imam (A.S.).(۳

Of course, the possibility is brought up in some legal texts that the payment of diya (will rest upon the child until after maturity to pay it himself.(۴

Third, quasi-deliberate offense: What is meant by quasi-deliberate, also known as ʿamd

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.Faydh, ʿAli Ridha, Mabadi-yi Fiqh wa Usul, p. ۳۱۵ -۱

Ibn Barraj Tarablusi, Qadhi ʿAbd al-ʿAziz, Jawahir al-Fiqh, ed. Ibrahim Bahaduri. ۱st -۲ edition, Muʿassisa-yi Nashr-i Islami, Qum, ۱۴۱۱/۱۹۹۰, p. ۱۴۵-۱۴۶, issue ۵۱۳; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۶; Al-Jamiʿ li al-Shara'iʿ, p. ۳۵۸; Muhaqqiq Hilli, Shara'iʿ al-.Islam, ۴/۸۰۱; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ۳/۷۹

Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۵-۳۴۶; ʿAllama Hilli, Irshad al- -۳ Adhhan, ۱/۴۴۱; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid fi Sharh al-Qawaʿid, ۶/۱۲۴; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya,۷/۷۸; Shahid Thani, Zayn .al-Din b. ʿAli ʿAmili, Masalik al-Afham, ۱۲/۴۷۷

.See: Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۶ -۴

al-khata' (intentional blunder), is a state in which a person intentionally does

something but what ensues is not what he had intended (intentional in action and erroneous in purpose). For instance, he beats someone intentionally with a tool, which .is mostly not a killing tool but the victim dies thereby

According to the Shiʽa jurists, diya in qausi-deliberate offense will be paid for through the criminal's own property; therefore, by this presumption, the damage resulted from the criminal act of the abandoned child is to be paid for through his own (property.(١

Disagreement on the Custody of Abandoned Children

If we accept that finding and collecting a child from the public places create a right for the finder (multaqit) to undertake its custody, then the question arises as to if there are two or more finders who claim such a right, who can be entitled to take its ?custody

.There are three criteria presented in legal books to answer this question

First criterion, examining the evidence (bayyina): A group of jurists believe that in order to verify the claim of those who claim having found the child and having priority .for its custody, their documentary evidence has to be examined

If we presume that only one of the two persons has a document or evidence for his/her claim, the child's custody is to be entrusted to that same person. However, if both of them are able to present evidence to prove their claim, it is to be verified whether their evidence points to the time of finding the

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١- Tusi, Abu Jaʽfar Muhammad b. Hasan, Al-Mabsut, ٧/١١۵; Muhaqqiq Hilli, Shara'iʽ al-Islam, ۴/٨٠١; ٢/١٢۴; ʽAllama Hilli, Idhah al-Fawa'id, ٢/١۴٢; Shahid Thani, Zayn al-Din b. .ʽAli ʽAmili, Masalik al-Afham, ١٢/۴٧٧

child or without referring to the time, it just asserts that the child has been found by a .particular person

In case the documents each one of them presents does not refer to the time of the finding or if both refer to a specific time, these documents will lose their legal value and will be rejected. Nevertheless, if any of these documents report a different time for the finding of the child by an individual, the child's custody will be entrusted to the .one who declare an earlier time

It is obvious that if the content of the documents are different, with one reporting a specific time for finding the child and the other just pointing out the finding of the child by an individual without referring to the time, the child's custody will be entrusted to .the one whose documents determine a specific time

Naturally, if none of the claimants of finding the child can present supporting documents to prove their claim, then the Islamic ruler will, as he deems it advisable, (determine someone to undertake the custody.(١

Second criterion, examining the individuals' features: According to some jurists, in order to solve this disagreement the claimants' differences in four features of .religion, wealth, justice, and type of residence are to be examined

In case of their equality in these features, lots must be drawn to decide who would take the child's custody, since leaving the child's custody to both of them would cause detriment to the child.(٢) However, in case of inequality, a

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.Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ٣/٣۴٨-٣۴٩ -١

Muhaqqiq Hilli, Shara'i', ۴/٨٠٣; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al- -٢ .Bihiyya, ٧/٨٠

Muslim has priority over a non-Muslim, a trustworthy (just) Muslim over an impious (Muslim, rich over poor, and a townsman over a villager.(١

It is to be remembered that from the viewpoint of most jurists the gender of the claimants of picking up the child accords them no privilege and neither a man nor a

woman have priority over each other in this respect. Although a woman is more successful than a man in managing the child's affairs and her emotional aspects are stronger, the man has more ability in maintaining the child's life.(۲)

Third criterion, examining the child's situation: The proponents of this theory believe that if none of the two claimants did anything for picking up and taking care of the child, making decision about the child's custody would rest with the Islamic ruler.(۳)

But if both have attempted to pick up the child, the child's custody would be entrusted to the one who is sufficiently qualified to undertake this task and if both are equally qualified, the decision as to who should the child be entrusted to is made by means of drawing lots, the judge's decision, or letting the child to decide. Since entrusting the child to both of them or taking turns (muhayat) in taking care of the child, would inflict harm on it.(۴)

In our opinion and as we previously mentioned, finding a child and picking it up from public places does not entail any right for the fonder. Therefore, the one who finds a child

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۱- Al-Jami' li al-Shara'i', p.۳۵۷; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, ۳/۷۳; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۱.

۲- Idem, Tahrir al-Ahkam, ۲/۱۲۳; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۰; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, ۳/۷۴.

۳- Karaki, 'Ali b. Husayn, Jami' al-Maqasid, ۶/۹۹; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۱.

۴- Idem, Tahrir al-Ahkam, ۲/۱۲۳; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, ۳/۷۳.

has to hand it over to the institutions in charge of undertaking the life of such children.

After examining the individual and social competence of the person who asks for a child's custody and considering the child's interests, the institution hands over the child's custody to that person temporarily or for a limited period whether that same

.person has found the child or someone else has

Of course, the child's desire to live with a certain person when it has found power of .discrimination can also be one of the factors effective in the child's interests

Thus, presenting documents as to who has first found the child or examining the features of the individuals claiming to have found the child alone do not have any impact on entrusting the child to an individual, just as the finder's gender has no .effect in this respect

Kinship Relationship with the Abandoned Children

point

A child being left in public places provides an opportunity for a number of people with .different motivations to claim the found child to be theirs

Since this claim can have an impressive impact on the life process of the child, its .verification is one of the most important issues concerning the unattended children

Claiming a Blood Relation to the Child

point

:Talking about blood relation to a child is examinable in three ways

Claiming paternal relationship with the child .١

If someone who has found the child claims that the child is his or hers, a group of the jurists maintain that their claim suffices to prove paternal relation. The reason is that this confession does not harm anybody, as it is helpful to the child

p: ١٢٥

in that someone undertakes its responsibility, and it is a natural course of events (in agreement to the apparent state of affairs) as in normal circumstances no one takes care of another's child.(١) In contrast, some Sunni jurists have been quoted to say that

such a claim is not acceptable, since in normal conditions no one abandons one's own child in public places to require picking it up later.(۲)

However, some jurists, relying on the fact that the child does not enjoy a recognized parentage and adopting it does not do any harm to others, believe that if someone other than the finder of the child claims that the found child belongs to him, such a claim is acceptable although no evidence (bayyina) is available to prove it, in case the age of the child and that of the claimant is such that the child can normally be regarded as his or her child.(۳)

In contrast, Muhaqqiq al-Hilli maintains that this claim is not accepted unless the child itself accepts the existence of such a relation. On that basis, proving the paternal relation between an individual and the abandoned (unattended) child will depend on two factors: the claim of the claimant and the acceptance of this claim by the child after reaching maturity.(۴)

In the third case, two individuals – none of whom has had any role in picking up the child from public places as well as taking care of it – may claim to have a paternal relation to the

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۱- Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۷.

۲- 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۷.

۳- 'Allama Hilli, Irshad al-Adhhan, ۱/۴۴۱; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ۱۲/۴۸۳; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۷; Karaki, 'Ali b. Husayn, Jami' al-Maqasid, ۶/۱۱۸; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, ۱۰/۴۲۵; Wahid Bihbahani, Muhammad Baqir, Hashiya Majma' al-Fa'ida, p. ۵۸۸.

۴- Muhaqqiq Hilli, Shara'i' al-Islam, ۴/۸۰۲.

child.

It is clear that in this case, only the confession of the one who can present evidence (bayyina) to prove his claim will be taken into consideration. If we presume that both

of them can present evidence for such a claim, there are other ways in earlier Shiʽi and Sunni jurisprudential texts that can be referred to, such as physical resemblance between the man claiming to be the father and the child or drawing lots.(۱)

Finally, this may be claimed by the finder of the child on one hand and another person on the other, in which case, if they have contradicting documents, as in the previous case, there will be two ways for the Shiʽi and Sunni jurists to tackle the problem.(۲)

In any case, wherever a man claims to have a blood relation to a child and his claim is also accepted, the child will be regarded as his; but such a claim does not mean that the man's wife is the child's mother, too, even though that man claims such a relation, unless his wife accepts this claim as well.(۳)

۲. Claiming maternal relationship with the child

Independent study of this issue despite its close similarity to the previous one, i.e., proving a paternal relationship with a child, is because some jurists believe that there is no difference between a man and a woman in proving to have a blood relation with the child. As the man's confession is accepted, so also is the woman's, and the child is joined by her.(۴) In contrast, however, some contend

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۱- Tusi, Abu Jaʽfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۷ and ۳۵۰; Ibn Zuhra Hilli, Ghunyat al-Nuzuʽ, p. ۳۰۴; ʽAllama Hilli, Mukhtalaf al-Shiʽa, ۶/۱۰۷; Tusi, Abu Jaʽfar Muhammad b. Hasan, Al-Khilaf, ۳/۵۹۶, issue ۲۵; Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Masalik al-Afham, ۱۲/۴۸۳; Karaki, ʽAli b. Husayn, Jamiʽ al-Maqasid, ۶/۱۰۳; Ibn Qudama, Al-Mughni, ۶/۴۳۰; Al-Sharh al-Kabir, ۶/۴۳۵; Bani, Muhammad Nasir al-Din, Irwa' al-Ghalil fi Takhrij Ahadith Minar al-Sabil, ۸ vol., Al-Maktab al-Islami, Beirut, ۱۴۰۵/۱۹۸۵.

۲- Shahid Thani, Zayn al-Din b. ʽAli ʽAmili, Al-Durus, ۳/۸ Tusi, Abu Jaʽfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۷/۳۴۸; ʽAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۷۸-۲۷۹.

۳- Idem, Tahrir al-Ahkam, ۲/۱۲۴.

۴- Muhaqqiq Hilli, Shara'iʽ al-Islam, ۴/۸۰۲; Ardabili, Mawla Ahmad, Majmaʽ al-Fa'ida, ۱۰/۴۲۶.

that the method for proving the claim of a man and a woman to have a parental (paternal and maternal) relationship with the child is different for each.

Although a man's confession and claim suffices for the child to join him, a woman's confession to this end is not sufficient and she has to present evidence for her claim. That's because knowledge about the existence of a maternal-filial relation between a woman and a man is something which can be proved by observation since there are always some people present at the child-birth who can bear witness; but for a man's claim as to being a child's father such a witnessing is not possible.(١)

Therefore, if the woman can provide evidence for her claim, the child would be regarded as hers and her husband's, provided that it would be likely for her to have given birth to that child and the evidence can prove that the child has been born to her while she had been that man's wife.(٢)

And finally, the possibility has also been set forth that if the woman has a husband, her claim that the child is hers is not accepted; but if she does not have a husband, her claim is accepted because it is not possible for the child to belong to the woman but not to her husband; in other words, it is not possible for the woman to be the child's mother but her husband would not.(٣)

In any case, if two women claim that

١- 'Allama Hilli, Mukhtalaf al-Shi'a, ۶/١١٠; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, ١٢/۴٨٣; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ٣/٣۵٠.

٢- 'Allama Hilli, Tadhkirat al-Fuqaha, ٢/٢٧٨.

٣- Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ٣/٣۵٠; 'Allama Hilli, Tadhkirat al-Fuqaha, ٢/٢٧٨.

each of them is the abandoned child's mother, genealogically the child belongs to the woman who can present evidence for her calim, and if both of them have evidence for their claims, then due to contradiction the mother will be determined through casting

(lots.(1)

3. Claiming parental relationship with the child

If a couple, (a man and a woman) claim that the abandoned (unattended) child is theirs; the child genealogically belongs to both of them, since there is no incompatibility between these two claims.(2)

Denial of Blood Relation by the Child

Among the issues set forth about kinship relationship with unattended children is the child's acceptance or denial of kinship after reaching maturity.

The question is raised by the jurists as to what has to be done if after reaching maturity this child denies having any blood relation with the person who has had a parental claim on the child.

Some Shi'i jurists contend that the child's rejection (denial) after reaching maturity has no legal effect, unless he/she can provide some evidence for his/her claim.(3)

So far, we brought up the views of Shi'i jurists and lawyers concerning the claim to have kinship relation with unattended children based on admitting or rejecting to admit the existence of kinship relation with the child.

To our opinion, however, there is no reason for the validity of claiming (admitting) about proof of parental relation with the child, whether the claimant is the finder of the child or someone else, just as it makes no difference whether the finder is a man or a woman.

At present, since a physician or a midwife in the

۱- Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, ۳/۳۵۱; 'Allama Hilli, Tadhkirat al-Fuqaha, ۲/۲۸۰.

۲- Ibid.

٣ - ʿAllama Hilli, Idhah al-Fawa'id, ٢/١۴٠; Al-Jamiʿ al-ʿAbbasi, p. ٢۵٢; Ardabili, Mawla Ahmad, Majmaʿ al-Fa'ida, ١٠/۴٢۶.

hospital or a health care center carries out any childbirth in a city or village, the identity of the parents would be confirmed by means of the report provided by that center. Besides, in normal conditions, the child's national identity specifications based on the report presented by the center in which the childbirth is carried out is registered in the parents' national identity cards; and, in return, the specifications of the child's parents are registered in a national identity card that is issued for the child, as well.

Therefore, if a person – whether a man or a woman has found the child or someone else has – claims that the child is theirs, they have to present the required documents to prove their claim. Moreover, if we suppose that for any reason it is not possible to present such documents, their claim can be verified according to the child's blood group and that of the claimant, as well as through genetic tests and DNA information.

Therefore, if there are more than one person – two men, two women, or a man and a woman – claiming such a relation to the child, the required documents are to be scrutinized as explained above.

Conclusion: Proving the paternal or maternal relation to the child is in itself a proof of the maternal or paternal relation to it, too. That is to say, if it is clarified that a man is the child's father, it can be readily perceived whether his wife is the child's

mother or not. The child's claim after reaching maturity to accept or reject the above-mentioned relation is similarly examinable; the claimant's religion or beliefs do not have any impact on the process of examining his or her relation to the child.

Figurative Kinship with Abandoned Children

There is no doubt that the legal rights resulting from kinship is to be fulfilled only when there is a type of blood relation or a relation by marriage between the individuals, that

– is why adoption as asserted by the Qur’an lacks any legal impacts

nor has he made your adopted sons your sons. These are mere utterances of your …((mouths. But Allah speaks the truth and He guides to the way.);(1)

however, according to Islamic jurisprudence in order to enjoy some of the legal rights, a kind of figurative kinship can be established between individuals without any blood relation or a relation by marriage existing between them, known as wila’ .((alliance

The contract of figurative kinship (wila’) has two reciprocal legal impacts: 1. Inheritance, 2. Compensation of inadvertent financial damages. A person who lacks relations would agree that after their death their properties be transferred to another person (inheritance), provided that if in their lifetime they cause damage to others inadvertently, the other party would undertake to pay for it (alliance guarantee of (offense - wila’ dhiman jarira).(2)

The issue of wila’ is brought up along with the issues concerning the abandoned (unattended children) in order to determine whether they would involuntarily and in their own rights achieve figurative

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1- Q. 33: 4.

2- Wila’ is fulfilled in three ways: wila’ ‘itq (alliance of slave emancipation), wila’ Imam (alliance of Imam), and vila’ dhiman jarira (alliance guarantee of offense); for more information see: Fathullah, Dr. Ahmad, Mu‘jam-i Alfadh al-Fiqh al-Ja‘fari, p. 452.

kinship when they reach maturity, since they have no identified kinship and have no .clear kinship with anyone

Naturally, this issue is raised in case such a person [the abandoned child] is not voluntarily concluding a contract of figurative kinship (wila’ dhiman jarira) with another person, since, like everybody else, he/she too can conclude such a contract

with whomever he/she wishes and impart his/her alliance to that person,(۱) even though that person (multaqit) is the one who had found him/her in childhood and had undertaken his/her custody up to the age of maturity.(۲)

The important question, however, is whether the finder of the child and the one who is undertaking the child's custody is naturally undertaking its guardianship, too.

Referring to the traditions related by ʿAzrami and the prophetic tradition, some jurists contend that the child's guardianship (wila') after maturity would be upon its finder, unless they wish to leave their guardianship to another person, in which case they have to pay back all the expenses that the finder had spent for them since finding them up to the time they reached maturity.(۳) The result of such an issue, as related by Ibn Junayd, is that if they cannot pay pack the expenses that the finder had paid for them, their guardianship and the inheritance would belong to the person who had found them at childhood and taken care of.(۴)

To our opinion, the finder of the child does not have any natural guardianship over the child,(۵) because we explained before that the custody

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۱ -- Daylami, Hamzat b. ʿAbd al-ʿAziz, Al-Marasim al-ʿAlawiyya fi Ahkam al-Nabuwwiyya, ed. Muhsin Husayni Amini, Ahl al-Bayt World Association, Qum, ۱۴۱۴/۱۹۹۳, p. ۲۰۸; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Nihaya, p. ۳۲۳; ʿAllama Hilli, Tadhkirat al-Fuqaha, ۲/۲۸۵; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham , ۱۲/۴۶۸.

۲- To prove this issue two narrations by Hurayz and the narration by Mada'ini can be referred to; see: Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۸/۲۲۷, No. ۸۲۰; Kulayni, Muhammad b. Yaʿqub, Al-Kafi, ۵/۲۲۴, No. ۲.

۳ - Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, ۳/۳۴۷; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Khilaf, ۳/۵۹۴, issue ۲۱; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, ۷/۷۸, No. ۳۳۶; Ibn Abi Jumhur Ahsa'i, ʿAwali al-Li'ali, ۱/۲۲۵, No. ۱۱۶.

۴- See: ʿAllama Hilli, Mukhtalaf al-Shiʿa, ۶/۱۰۶.

۵- Al-Muqniʿa, p. ۶۴۸; Muhaqqiq Hilli, Sharaʾiʿ al-Islam, ۴/۸۰۰; ʿAllama Hilli, Tadhkirat al-

Fuqaha, ٢/٢٨٥; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, ٣/٨١; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, ٧/٧٧.

of an abandoned child with unlimited responsibility would normally require the payment of its living expenses as well. If this acceptance of responsibility is restricted to and contingent on some conditions including the refunding of the expenses spent for the child, it is upon the Islamic government to provide for those expenses; thus, there remains no right for the finder of the child to undertake the found child's guardianship accordingly.

However, after maturity, the abandoned children (laqit) had better leave their guardianship to the person who had taken care of them for years.

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About center

In the name of Allah

هَلْيَسْتَوِيالَّذِينَيَعْلَمُونَوَالَّذِينَلَايَعْلَمُونَ

?Are those who know equal to those who do not know

al-Zumar: ٩

:Introduction

Ghaemiyeh Computer Research Institute of Isfahan, from ٢٠٠٧, under the authority of Ayatollah Haj SayyedHasanFaqihImami (God blesses his soul), by sincere and daily efforts of university and seminary elites and sophisticated groups began its activities .in religious, cultural and scientific fields

:Manifesto

Ghaemiyeh Computer Research Institute of Isfahan in order to facilitate and accelerate the accessibility of researchers to the books and tools of research, in the field of Islamic science, and regarding the multiplicity and dispersion of active centers in this field

and numerous and inaccessible sources by a mere scientific intention and far from any kind of social, political, tribal and personal prejudices and currents, based on performing a project in the shape of (management of produced and published works from all Shia centers) tries to provide a rich and free collection of books and research papers for the experts, and helpful contents and discussions for the educated generation and all classes of people interested in reading, with various formats in the .cyberspace

:Our Goals are

(propagating the culture and teachings of Thaqalayn (Quran and Ahlulbayt p.b.u.t-

encouraging the populace particularly the youth in investigating the religious issues-

replacing useful contents with useless ones in the cellphones, tablets and computers-

providing services for seminary and university researchers-

spreading culture study in the publich-

paving the way for the publications and authors to digitize their works-

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acting according to the legal licenses-

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avoiding parallel working-

merely presenting scientific contents-

mentioning the sources-

.It's obvious that all the responsibilities are due to the author

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.Producing animations, computer games and etc-

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Designing systems of accounting, media and mobile, automatic and handy systems,- web kiosks

Holding virtual educational courses for the public-

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:Appreciation

We would appreciate the centers, institutes, publications, authors and all honorable .friends who contributed their help and data to us to reach the holy goal we follow

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